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*HOW WOMEN COULD SAVE THE WORLD, IF ONLY WE WOULD LET THEM:
FROM GENDER ESSENTIALISM TO INCLUSIVE SECURITY*

28 Yale Journal of Law & Feminism__ (2017)

Catherine Powell*

Abstract

We increasingly hear that empowering women and placing them in positions of leadership will lead to a safer, more prosperous world. The UN Security Council's groundbreaking resolutions on Women Peace, and Security (WPS) — and U.S. law implementing these commitments — rest on the assumption that women's participation in peace and security matters will lead to more sustainable peace, because women presumably “perform” in ways that reduce conflict, violence, and extremism. This idea is of heightened importance today because women are still vastly underrepresented in positions of leadership in the peace and security field, having yet to “shatter that highest and hardest glass ceiling” as Commander-in-Chief in the United States or rise to the role of Secretary-General in the United Nations. Before her own historic race to become the first woman Commander in Chief, Hillary Clinton had prominently made the claim we increasingly hear that women's empowerment is not only the right thing to do, but the smart thing to do for global and economic security.

Such claims raise fundamental questions for international law, equality theory, and feminism. Assertions that the world would be a better—more peaceful, more prosperous—place, if women assumed leadership positions in peace and security matters are unapologetically instrumentalist and reinforce essentialist views of women. At the same time, evidence suggests that these claims are to some extent accurate. Thus, these assertions should be carefully examined. Reviewing new research, this Article argues that while some evidence supports these claims, the *statistical* evidence supporting these claims suffers from methodological flaws. Moreover, the forms of gender performance reflected in the data—which international law has organized itself around—are based on the *socially constructed* roles women play as caregivers, nurturers, and collaborators, not necessarily on their inherent biological roles. Yet, international law reifies these roles and the stereotypes that surround them, even as it tries to open up opportunities for women beyond traditional sex-segregated positions that have long relegated women around the world to the pink ghetto of economic inequality and inferior political and social status. Having to maneuver around formal equality, on the one hand, and instrumentalist claims that women will “save” the world, on the other, means that the category of “woman” can restrict even as it liberates. After all, not all women are “peace-loving,” particularly in a world where the women who succeed are often those who can succeed on terms defined by men.

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Two prevailing theoretical frameworks—antibsubordination and securitization—shape the current debate about WPS, but each ultimately falls short. This Article identifies democratic legitimacy as a novel third approach missing from the existing debate. As an alternative view, the democratic legitimacy account effectively reframes the WPS debate as one concerning *inclusive* security—emphasizing that women’s participation enhances the representativeness, democracy, and fairness of the process as a whole—rather than privileging the “special interests” of a particular group (as the antibsubordination approach is accused of doing) or reinforcing gender essentialism (as the securitization approach does). Notably, a democratic legitimization paradigm is grounded in a model of inclusion that can be applied to vectors of inequality beyond gender, as well as to inequality at the intersection of various forms of inequality. Moreover, by emphasizing democratic representation, this approach insists on local ownership and bottom-up solutions, thereby emphasizing participation and leadership by women in conflict zones, rather than female global elites. Under a democratic legitimacy paradigm, women can still “save” the world, but in a different way than the predominant discourse would have us believe.

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INTRODUCTION

We increasingly hear that empowering women and placing them in positions of leadership will lead to a safer, more prosperous world. The UN Security Council’s groundbreaking resolutions on Women, Peace, and Security (WPS)¹ — and U.S. law² implementing these commitments — rest on the assumption that women’s participation in peace and security matters will lead to more sustainable peace, because women presumably “perform” in ways that reduce conflict, violence, and extremism. This idea is of heightened importance today because women are still vastly underrepresented in positions of power generally and in leadership in the peace and security field specifically, having yet to “shatter that highest and hardest glass ceiling”³ as Commander-in-Chief in the United States or rise to the role of Secretary-General in the United Nations.⁴ Before her own race to become the first woman Commander in Chief of the United States, Hillary Clinton had prominently made the claim we

¹ The first of these resolutions, S.C. Res. 1325 (Oct. 31, 2000), was followed by a series of subsequent resolutions, discussed *infra* Part I.

² See *infra* Part I.

³ Gail Collins, *The Glass Ceiling Holds*, NYTimes (Nov. 11, 2016)(quoting Hillary Clinton in her concession speech the day after losing the U.S. presidential election to Donald Trump), <http://www.nytimes.com/2016/11/13/opinion/sunday/the-glass-ceiling-holds.html>. For a recent overview of the underrepresentation and status of women and girls more generally, see, e.g., NO CEILINGS: THE FULL PARTICIPATION REPORT (Mar. 2015), <http://www.noceilings.org/report/report.pdf> (discussing data-driven analysis of the progress and remaining challenges in global gender equality over the past twenty years).

⁴ A woman has yet to take the helm at the United Nations. In 2016, a global “Campaign to Elect a Woman UN Secretary-General” garnered substantial support and identified a talented pool of female candidates to be the next UN Chief. See CAMPAIGN TO ELECT WOMAN UN SECRETARY-GEN. 2016, <http://www.womansg.org/> (promoting the slogan, “We have had 8 male Secretaries-General and our 9th should be a woman”). However, a male candidate, António Guterres, a former Portuguese Prime Minister and former UN High Commissioner for Refugees, was ultimately selected. See, e.g., *Portugal’s Antonio Guterres Elected UN Secretary-General*, BBC NEWS (Oct. 14, 2016), <http://www.bbc.com/news/world-37648265> (“Mr. Guterres’ nomination came despite a concerted effort to appoint the UN’s first female secretary general.”).

increasingly hear that women's empowerment is not only the right thing to do, but the "smart" thing to do for global and economic security.⁵

Such claims, which are prevalent across a variety of sectors,⁶ raise fundamental questions for international law, equality theory, and feminism. Assertions that the world would be a better — more peaceful, more prosperous — place if women assumed leadership positions are unapologetically instrumentalist and reinforce essentialist views of women. At the same time, evidence suggests that these claims are to some extent, though not entirely, accurate. Thus, these assertions should be carefully examined. Reviewing new research, this Article argues that while some evidence certainly supports these claims, the *statistical* evidence suffers from methodological flaws. Moreover, the forms of gender performance reflected in the data—which international law has organized itself around—are based on the *socially constructed* roles women play as caregivers, nurturers, and collaborators, not necessarily on their inherent biological roles. The WPS agenda can be easily (mis)understood as based on an assumption that women are *innately* wired for peace. However, as WPS adherents acknowledge, not all women are "peace-loving," particularly in a world where the women who succeed are often those who can succeed on terms defined by men. To deny that at least some women can be as militaristic and hawkish as men is to deny women agency and self-expression.

Paradoxically, the claim that women's participation in peace and security enhances prospects for peace is based on traditional assumptions about women and a conventional understanding of women as inherently different from men, at the same time as it is geared toward increasing the inclusion of women in the historically male peace and security sector. The international and U.S. law developing in support of WPS further reifies conventional assumptions about women—and the gender-based stereotypes that surround them—even as it tries to open up opportunities for women beyond the traditional sex-segregated positions that have long relegated women around the world to the pink ghetto of economic inequality and inferior political and social status. How can women demand a right to fight in combat alongside

⁵ See, e.g., Lucy Madison, *In Farewell Speech, Clinton Calls for "Smart Power" on Global Stage*, CBS NEWS (Feb. 1, 2013, 8:29 AM), http://www.cbsnews.com/8301-250_162-57566994/in-farewell-speech-clinton-calls-for-smart-power-on-global-stage (quoting former Secretary of State Hillary Clinton as saying, "The jury is in. The evidence is absolutely indisputable: If women and girls everywhere were treated as equal to men in rights, dignity, and opportunity, we would see political and economic progress everywhere. . . . So this is not only a moral issue. Which of course it is. It's an economic issue and a security issue It therefore must be central to U.S. foreign policy.").

⁶ As I have argued elsewhere, there is a growing trend toward using such instrumentalist claims to gain support for women's rights law reform as a means of achieving other goals, such as economic development. Catherine Powell, *Gender Indicators in Global Governance: Not Your Father's World Bank*, in *BIG DATA, BIG CHALLENGES IN EVIDENCE-BASED POLICY MAKING* (Kumar Jayasuriya ed., 2015) (updated version with latest World Bank data to be reprinted in 17 *GEO. J. GENDER & L.* (forthcoming 2016)) [hereinafter *Gender Indicators in Global Governance*] (scrutinizing the use of quantitative indicators that prioritize gender equality projects that demonstrably promote broader economic growth and development goals over women's empowerment initiatives that are created for the sake of gender equality *qua* gender equality, but cannot be quantitatively linked to broader outcomes). This Article is a sister project, aimed at examining the parallel trend toward using instrumentalism to pursue women's rights law reform as a means of achieving another broad goal affecting the common good (beyond gender equality): building sustainable peace and security.

men, much less to be Commander in Chief, if the prevailing narrative is that women are more peace-oriented than men?⁷

For the purposes of this Article, I am adopting a feminist analysis that views gender as “the social meaning given to the biological differences of sex.”⁸ Gender itself is “performative – a doing and constituting of the identity.”⁹ As feminist scholar Judith Butler argues, “As in other ritual social dramas, the action of gender requires a performance that is *repeated*. This repetition is at once a reenactment and a reexperiencing of a set of meanings already socially established; and it is the mundane and ritualized form of their legitimation.”¹⁰ Rather than view gender as a “stable identity or locus of agency,” identity should be understood as “tenuously constituted in time . . . through a *stylized repetition of acts*.”¹¹ Embracing the approach that gender is performative, this Article views gender differences in the ways women and men “perform” in the peace and security sphere as socially constructed, rather than biologically inherent.¹² On this account, women are not *inherently* more peaceful, but, because women around the world have traditionally been largely excluded from military, national security, and foreign policy positions, women have historically brought different social experiences to peace-making processes. Now that opportunities are rapidly opening up for women in these historically male sectors, and now that women are able to fight in combat positions in some countries, the way women “perform” in peace and security matters may shift in the not-too-distant future. Therefore, the goal of this Article is to consider the prevailing normative frameworks of WPS while looking just slightly

⁷ Even asking the question whether women’s participation enhances prospects for peace (as if asking women are inherently more peaceful) raises “the spectre of gender essentialism.” Fionnuala Ní Aoláin, *More Women – But Which Women? A Reply to Stephanie Hennette Vauchez*, 26 EUR. J. INT’L L. 229, 230 (2015) (making a similar point in discussing her own candidacy to be a judge on the European Court of Human Rights).

⁸ Brenda Cossman, *Gender Performance, Sexual Subjects, and International Law*, 15 CANADIAN J. L. & JURIS. 281, 281-82 (2002) (criticizing the fact that in international law, “[g]ender continues to be a category related in some fundamental way to sex” and seeking to “disrupt the pervasive understanding of gender as the cultural interpretation of sex” in international law”). Cossman contends that “the underlying category of sex is neither natural nor biologically determined, but rather, is itself discursively produced in and through gender.” *Id.* (quoting JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (1990) [hereinafter *GENDER TROUBLE*], and JUDITH BUTLER, *BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF “SEX”* (1993) [hereinafter *BODIES THAT MATTER*]). *But see* HILARY CHARLESWORTH & CHRISTINE CHINKIN, *THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS* 3 (2000) (defining “gender” as capturing “the ascribed, social nature of distinctions between women and men—the excess cultural baggage associated with biological sex”).

⁹ Cossman, *supra* note 8, at 282.

¹⁰ BUTLER, *GENDER TROUBLE*, *supra* note 8, at 140.

¹¹ *Id.*

¹² Even “biologically oriented researchers investigating gender-related social behaviors generally acknowledge that first, biological predispositions can be altered over time through experience, and second, existing dispositions can be mitigated or overridden by situational demands.” CHRISTOPHER F. KARPOWITZ & TALİ MENDELBERG, *THE SILENT SEX: GENDER, DELIBERATION, AND INSTITUTIONS* 51 n.1 (2014) (quoting Campbell Leaper & Melanie M. Ayres, *A Meta-Analytic Review of Gender Variations in Adults’ Language Use: Talkativeness, Affiliative Speech, and Assertive Speech*, 11 PERSONALITY & SOC. PSYCHOL. REV. 328, 331 (2007)).

over the horizon – in recognition that gender roles are evolving and will continue to do so¹³ – to envision new conceptual frames that more adequately capture why women’s participation in peace and security continues to be critical to make the world a safer, better place for all.

In justifying women’s participation in peace and security matters, WPS proponents draw on two broad prevailing theoretical frameworks, each of which is ultimately insufficient. This Article examines the two prevailing accounts in light of new quantitative and qualitative research on women’s participation in developing peace agreements, and then offers and theorizes an alternative, third approach.

The antisubordination account¹⁴ supporting women’s participation in peace negotiations asserts that increasing opportunities for women’s participation is morally justified as a matter of equal citizenship, fairness, human dignity, and as a means of destabilizing patriarchy. However, critics of the antisubordination account note that the doctrinal and political commitments to formal equality, which are prevalent in many legal systems, frequently fail to approximate the desire for substantive equality underlying the antisubordination account. Further, those who oppose taking gender into consideration contend that determining who to bring to the peace table should be gender-blind and turn only on qualifications and relevant proximity to the conflict (in both cases, frequently defined narrowly and in male terms, based on traditional understandings of qualifications and the battlefield).

The other major view is the securitization account, which advances women’s participation in peace-making as a means of enhancing the prospects for peace and deeper security. Because the antisubordination account suffers from the doctrinal and political challenges posed by formal equality, the securitization account has now become the dominant approach to justify WPS.¹⁵ But opponents of the securitization account assert that the data does

¹³ As one example of the shift in gender roles in the United States alone, the Pew Research Center reported in 2013 that “[a] record 40% of all households with children under the age of 18 include mothers who are either the sole or primary source of income for the family. . . . The share was just 11% in 1960.” Wendy Wang, Kim Parker & Paul Taylor, *Breadwinner Moms: Mothers Are the Sole or Primary Provider in Four-in-Ten Households with Children; Public Conflicted About the Growing Trend*, PEW RES. CTR. SOC. & DEMOGRAPHIC TRENDS (May 29, 2013), <http://www.pewsocialtrends.org/2013/05/29/breadwinner-moms/>; see also Hanna Rosin, *New Data on the Rise of Women*, TED (Dec. 2010), http://www.ted.com/talks/hanna_rosin_new_data_on_the_rise_of_women?utm_source=tedcomshare&utm_medium=email&utm_campaign=tedspread.

¹⁴ “Antisubordination theorists contend that guarantees of equal citizenship cannot be realized under conditions of pervasive social stratification and argue that law should reform institutions and practices that enforce the secondary social status of historically oppressed groups.” Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 9 (2004). For a more recent discussion, see Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278 (2011).

¹⁵ For a notable, high-profile discussion (and critique) of “securitizing” women’s rights, see Radhika Coomaraswamy et al., *Preventing Conflict, Transforming Justice, Securing the Peace: A Global Study on the Implementation of United Nations Security Council Resolution 1325*, UN WOMEN 394 (2015), <http://wps.unwomen.org/~media/files/un%20women/wps/highlights/unw-global-study-1325-2015.pdf> (recently

not support a conclusion that women's participation *causes* more durable peace, and that the extent of the correlation is unclear given the difficulty of controlling for other factors. Along with methodological problems, critics express concerns about the dangers of essentializing gender and instrumentalizing feminism.

This Article proposes and theorizes a novel third alternative — democratic legitimacy — that is missing from the current WPS debate, yet is descriptively more accurate and normatively more appealing than the two predominant accounts.¹⁶ Moving beyond the prevailing debate, a democratic legitimacy account demonstrates that increasing women's participation in peace-making creates a more representative, universal, democratic, and fair process with greater buy-in from the community as a whole. In addition to realizing the goals of both antisubordination (which aims to advance meaningful equality) and securitization (which aims to create sustainable peace based on greater buy-in from more people), a democratic legitimization account also performs important conceptual work independent of the two prevailing approaches. In contrast to the antisubordination narrative, which emphasizes equal access for members of a particular group (here, women) — raising the (admittedly unfair) specter of “preferential treatment” and “special interests”¹⁷ — a democratic legitimacy framework offers an account of the representativeness and fairness of the process for *all* on whose behalf the process is claimed and power within the process allocated. In contrast to the securitization view — which rests on essentialist assumptions about women and an as-yet incomplete empirical record — democratic legitimacy addresses the fairness, not just the inefficacy, of excluding half of humanity in a process whose outcomes will be imposed on all. Importantly, a democratic legitimization paradigm is grounded in a model of inclusion that can be applied to vectors of inequality beyond gender, as well as to inequality at the intersection of various forms of inequality.¹⁸ Moreover, by emphasizing democratic representation, this approach insists on local ownership and bottom-up

released UN-commissioned global study on the implementation of Resolution 1325, warning that the WPS agenda should not be “securitized” and “women should never be used as instruments in any military strategy”).

¹⁶ Cf. Julie C. Suk, *Gender Parity and State Legitimacy: From Public Office to Corporate Boards*, 10 INT'L J. CONST. L. 449 (2012) (proposing “democratic governance” and “democratic legitimacy” as effective ways in which state and corporate gender quotas have been framed in Europe); Julie C. Suk, *Quotas and Consequences: A Transnational Re-evaluation*, in PHILOSOPHICAL FOUNDATIONS OF DISCRIMINATION LAW 2 (Deborah Hellman & Sophia Moreau eds., 2013) (discussing deontological and consequentialist accounts of affirmative action and proposing “parity democracy” or “gender balance” as the best way to support it).

¹⁷ For powerful critiques of the notions of “preferential treatment” and “special treatment,” see Luke Charles Harris & Uma Narayan, *Affirmative Action as Equalizing Opportunity: Challenging the Myth of “Preferential Treatment,”* in ETHICS IN PRACTICE: AN ANTHOLOGY 492 (Hugh LaFollette ed., 3d ed. 2007); and Kimberle Crenshaw, *A Preference for Deception: Ward Connerly Steals the Language of Civil Rights to Halt Affirmative Action*, MS., (Winter 2008), <http://www.ms magazine.com/winter2008/WardConnerlyPart2.asp>.

¹⁸ See Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991). Crenshaw originally developed the legal theory of intersectionality in the context of antisubordination theory, but this powerful concept can also be applied in the context of democratic legitimacy, given that the underrepresentation of women is compounded at the intersection of other forms of disenfranchisement, such as subordination based on race and ethnicity.

solutions, emphasizing participation and leadership of women in conflict zones, rather than female global elites.

A democratic legitimacy approach would more effectively reframe WPS as “inclusive security,” a term coined by Ambassador Swanee Hunt that refers to “a diverse, citizen-driven approach to global stability, emphasiz[ing] women’s agency, not their vulnerability,” by including women in decision-making about peace and security.¹⁹ But while Ambassador Hunt approaches inclusive security from a primarily securitization-based perspective,²⁰ this Article uses the notion of inclusive security to ground a rationale for WPS based on democratic legitimation. As discussed in Part I, civilian women often experience war differently than combatant men. At least in the short term — while this gendered divide still exists — gender-balanced processes can lead to more durable peace, assuming other conditions are present. However, because gender is socially constructed and identity is “tenuously constituted in time,”²¹ over the longer run, the essentialist view inherent in the securitization account may not hold up if women begin to perform in different ways as gender roles change.

Thus, the challenge that WPS seeks to address is a transitional justice problem. Just as societies have transitioned from systems of grave injustice to more democratic arrangements, WPS is part of a gender equality transition that is shifting societies around the world from systems in which women are largely excluded to structures that are more inclusive and reflect more equal distributions of power. As Antonio Gramsci noted, in such moments of transition, we live in a period of chaos and struggle as we build the new system.²² WPS should be understood as a vehicle to assist in the transition to the new system of greater inclusion.

From a democratic legitimacy perspective, greater gender parity is important, not necessarily because it will always lead to more peaceful substantive outcomes but because, when women are included, the inputs into the process include members of the community who are newly entitled to participate as equal citizens and who bring to the table worthy experiences and perspectives that would otherwise be absent. Creating a more representative, universal, democratic, and fair process by including such “outsider” perspectives not only secures greater buy-in from the community as a whole but also reveals blind spots, thereby providing more complete information and limiting the possibilities for misunderstanding. By upending the notion that performing in ways commonly associated with “masculinity” is always the ideal, gender

¹⁹ Swanee Hunt & Cristina Posa, *Women Waging Peace: Inclusive Security*, FOREIGN POL’Y, May/June 2001, at 38.

²⁰ Note that while Ambassador Hunt approaches WPS from a securitization perspective, she acknowledges that women should be free to exercise their own agency in, for example, choosing militarism over peace, and that therefore women’s participation does not always necessarily lead to more peaceful outcomes. Swanee Hunt, *Who Decides on War and Peace? Revolutionizing Leadership for Global Security*, COUNCIL ON FOREIGN REL. (May 13, 2015), <http://www.cfr.org/defense-and-security/decides-war-peace-revolutionizing-leadership-global-security/p36567>.

²¹ BUTLER, GENDER TROUBLE, *supra* note 8, at 140.

²² ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI 276, (Quintin Hoare & Geoffrey Nowell Smith eds. & trans., 1999).

diversity not only creates a more equal distribution of power but also establishes a different and often better dynamic for deliberation for both women and men. As political scientists Karpowitz and Mendelberg note, “masculine leadership styles are in some ways risky not only for women but also for the men who engage in them.”²³ In fact, “an environment where subordinates are cultivated and supported credit is shared, and conflict is handled through honest and open communication [social behavior commonly associated with women] can be quite positive for everyone involved.”²⁴

Why does this matter? Despite the end of the Cold War, armed conflict is still prevalent.²⁵ For its part, the United States has been at war continuously since the start of its invasion of Afghanistan in 2001. While women’s representation in the peace and security sectors is still small,²⁶ it is growing. Given the steady emergence of women in these sectors — including women in prominent foreign policy leadership roles and (with the end of the combat ban) women in combat roles in the U.S. military²⁷ —the data and theoretical rationales underlying calls to increase women’s participation in these fields have broad implications, not only for matters of war and peace writ large, but also for a range of activities in between, including conflict prevention, peacemaking, peacekeeping, post-conflict reconstruction, and stabilization.

Part I of this Article provides a legal framework for and additional background on WPS, analyzes why so few women are involved in making peace agreements, and examines new research demonstrating a correlation between women’s participation and the durability of peace agreements. In light of this research, Part II explores the antisubordination and securitization accounts that justify increasing women’s participation in peacemaking, as well as criticisms of these accounts. As an alternative framework, Part III proposes a new, third rationale for women’s representation based on a theory of democratic legitimacy — a point thus far obscured in the current WPS debate. Part IV demonstrates that a democratic legitimation approach holds the greatest potential to move beyond the existing accounts and to reframe WPS as “inclusive security.”²⁸ In a sense, then, women can still “save” the world, but in a different way than the predominant discourse would have us believe.

²³ See KARPOWITZ & MENDELBERG, *supra* note 12, at 53.

²⁴ *Id.*

²⁵ See, e.g., Therése Pettersson & Peter Wallensteen, *Armed Conflicts, 1946–2014*, 52 J. PEACE RES. 536, 536, (2015) (noting that 2014 saw “the highest number of conflicts reported since 1999” and “the highest number of battle-related deaths in the post-1989 period” due to the “escalation of several conflicts, coupled with the extreme violence in Syria,” though “compared to the large-scale interstate wars of the 20th century, the number of fatalities caused by armed conflicts in 2014 was relatively low”).

²⁶ See *infra* Part I.

²⁷ Bill Chappell, *Pentagon Says Women Can Now Serve in Front-Line Ground Combat Positions*, NPR (Dec. 3, 2015, 11:56 AM), <http://www.npr.org/sections/thetwo-way/2015/12/03/458319524/pentagon-will-allow-women-in-frontline-ground-combat-positions>.

²⁸ Hunt & Posa, *supra* note 19, at 47.

I. Women's Participation in Peace Processes

While the number of women in peace and security sectors is still extremely small, women are increasingly playing integral roles in peace processes. Following an explosion of feminist international law criticism, doctrinal developments, and sudden attention by human rights organizations to women's rights at the end of the twentieth century,²⁹ the UN Security Council adopted Resolution 1325 on WPS in 2000. Even at that early juncture, the assumption that women's participation in peace and security issues would lead to a more peaceful and secure world was deeply embedded in the way policymakers framed WPS.

Section A of this Part explains the legal framework and how shifting legal norms embed changing assumptions about gender and gender equality. Section B explores why there are still so few women involved in developing peace agreements. Section C unpacks new research to investigate the relationship between women's involvement in peacemaking and prospects for securing sustainable peace.

A. Legal Framework: Embedding Gender Norms

In adopting UNSCR 1325, the Security Council highlighted the disproportionate impact of conflict on women and called for greater representation of women in the resolution of conflict and peace-building. In other words, it stressed that international law and international relations should view women not only as *victims* of war (including of rape and other crimes of sexual violence that occur in armed conflict), but also as *agents* of securing and sustaining peace through their roles in conflict prevention, peacemaking, peacekeeping, post-conflict reconstruction, and stabilization. In so doing, Resolution 1325 developed a whole new field of inquiry on women, peace, and security. In response, the United States³⁰ and at least sixty-three countries³¹ have implemented Resolution 1325 as domestic law.³²

²⁹ The 1990s included, *inter alia*, the 1995 UN Fourth World Conference on Women in Beijing; the founding of women's rights divisions at Human Rights Watch and other organizations; calls to "mainstream" gender in multi-lateral institutions; and the inclusion of rape and other forms of sexual violence as a crime in the International Criminal Court statute (following the partially successful push to have sexual violence addressed in the war crimes statutes and jurisprudence growing out the conflicts in the former Yugoslavia and Rwanda).

³⁰ Exec. Order No. 13,595, 3 C.F.R. § 321 (Dec. 19, 2011).

³¹ As of May 2016, sixty-three nations have created a National Action Plan (NAP) on United Nations Security Council Resolution (UNSCR) 1325. *National Action Plan Resource Center*, INCLUSIVE SECURITY, <https://actionplans.inclusivesecurity.org/>. At least sixteen additional NAPs are currently being developed. *Id.*

³² Whether Resolution 1325 itself is legally binding as matter of *international* law is a matter of debate, but is not entirely relevant for this Article. The United States has made Resolution 1325 legally binding via Executive Order 13555, and other countries have also incorporated it into their respective *domestic* laws. *See* sources cited *supra* notes 30-31. In any event, for international law purposes, UNSCR 1325 is a legal norm, whether binding or not (i.e., whether hard or soft law). While others have addressed the question of the binding nature of the international law norm, the purpose of this Article is to address its conceptual underpinnings. For an inquiry into whether UNSCR

Resolution 1325 urges national governments and the United Nations to take action in at least three key ways. First, it calls for women's participation in decision-making and peace processes.³³ Second, it calls on all parties to armed conflict to respect the "rights and protection of women and girls, especially as civilians."³⁴ Third, the Resolution outlines a number of steps to include gender-based perspectives and gender training in a variety of peace-keeping and peace-building programs.³⁵

To encourage implementation of UNSCR 1325, the Security Council has issued presidential statements to call on member states to develop national action plans or other national-level strategies.³⁶ In addition to providing opportunities to identify priorities, develop strategies, and determine responsibilities and timeframes, the creation of national action plans (NAPs) offers a process for raising awareness and building capacity to address gaps and challenges in implementing Resolution 1325.³⁷ A number of governments that are developing

1325 is legally binding, see Carol Cohn, Helen Kinsella & Sheri Gibbings, *Women, Peace and Security: Resolution 1325*, 6 INT'L FEMINIST J. POL. 130 (2004).

³³ For example, the Resolution "[u]rges Member States to ensure increased representation of women at all decision-making levels in national, regional and international institutions and mechanisms for the prevention, management, and resolution of conflict," S.C. Res. 1325, *supra* note 1, ¶ 1 (emphasis omitted), and calls on negotiators of peace agreements to adopt "[m]easures that support local women's peace initiatives and indigenous processes for conflict resolution, and that involve women in all of the implementation mechanisms of the peace agreements," *id.* ¶ 8(b). UNSCR 1325 also encourages the UN Secretary-General "to appoint more women as special representatives and envoys;" to "expand the role and contribution of women in United Nations field-based operations . . . especially among military observers, civilian police, human rights and humanitarian personnel;" and "to implement [the Secretary-General's] strategic plan of action . . . calling for an increase in the participation of women at decision-making levels in conflict resolution and peace processes." *Id.* ¶¶ 2-4.

³⁴ *Id.* ¶ 9. UNSCR 1325 urges all actors to adopt "[m]easures that ensure the protection of and respect for human rights of women and girls, particularly as they relate to the constitution, the electoral system, the police and the judiciary," *id.* ¶ 8(c), as well as obligations under basic international human rights and humanitarian law treaties, *id.* ¶ 9. The Resolution also calls for "special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse, and all other forms of violence in situations of armed conflict." *Id.* ¶ 10. It further emphasizes "the responsibility of all States to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity, and war crimes including those relating to sexual and other violence against women and girls, and . . . stresses the need to exclude these crimes . . . from amnesty provisions" in peace deals. *Id.* ¶ 11.

³⁵ In addition to expressing the Security Council's "willingness to incorporate a gender perspective into peacekeeping operations," the Resolution "urges the Secretary-General to ensure that . . . field operations include a gender component," *id.* ¶ 5, and "to provide to Member States training guidelines and materials on the protection, rights and the particular needs of women, as well as on the importance of involving women in all peacekeeping and peacebuilding measures," *id.* ¶ 6. Additionally, UNSCR 1325 encourages "Member States to increase their voluntary financial, technical and logistical support for gender-sensitive training efforts" carried out by various UN agencies. *Id.* ¶ 7.

³⁶ U.N. President of the S.C., Statement dated Oct. 28, 2004, U.N. Doc. S/PRST/2004/40 (Nov. 2, 2004); U.N. President of the S.C., Statement dated Oct. 27, 2005, U.N. Doc. S/PRST/2005/52 (Oct. 27, 2005).

³⁷ INTER-AGENCY NETWORK ON WOMEN & GENDER EQUAL., NAT'L IMPLEMENTATION OF SEC. COUNCIL RESOLUTION 1325 (2000), http://www.un.org/womenwatch/ianwge/taskforces/wps/national_level_impl.html.

NAPs to implement 1325 are “mainstreaming a gender perspective” into their training of military personnel and peacekeepers and into their development aid packages for post-conflict countries.³⁸

In a sense, Resolution 1325 planted the seeds for the all three theoretical frameworks for WPS discussed in this Article — the antisubordination, securitization, and democratic legitimization understandings. From an antisubordination standpoint, the preamble to 1325 stresses “the importance of [women’s] *equal participation* and full involvement in all efforts for the maintenance and promotion of peace and security.”³⁹ The securitization view is implicit in the same preambular paragraph, which “[r]eaffirm[s] the *important role of women* in the prevention and resolution of conflicts and in peace-building.”⁴⁰ What I call a democratic legitimization account is also implicit in this paragraph, which emphasizes “the need to *increase [women’s] role in decision-making* with regard to conflict prevention and resolution.”⁴¹ However, the primary rationale offered to support WPS has been the securitization framework, which relegates the goal of challenging the inequality and subordination women face in the field to a footnote. The democratic legitimacy account has been virtually absent.

The rise of the securitization account in WPS mirrors the framework frequently used to advance women’s empowerment more broadly in international law and international affairs (as well as the realist approach to international relations more generally). Women’s rights proponents, for example, increasingly rely on the “measurable and positive impact that women’s rising economic, social and political power has on the protection and promotion of the common good.”⁴² This trend is not limited to women’s rights advocates, though. Powerful male leaders —

³⁸ *Id.*

³⁹ *Supra* note 1, ¶ 5 (emphasis added).

⁴⁰ *Id.* (emphasis added).

⁴¹ *Id.* (emphasis added).

⁴² *See, e.g.,* Dorothy Q. Thomas, Women’s History Month Lecture at the League of Women Voters of Ozaukee Cty., The W-Factor: Women, Power and American Progress 4 (Mar. 7, 2015) (on file with author). Thomas uses the expression the “W-Factor” to describe this phenomenon: “I don’t mean to imply that women are inherently the kinder, gentler sex and care more about others than do men. . . . I’ve seen individual women and men . . . abuse power with equal avidity. . . . [But] women, when organized collectively, inclusively, and transparently, tend as a group to act in a manner that favors all people’s equality and dignity and NOT only in our own so called ‘special interest.’” *Id.* at 7.

such as President Obama,⁴³ UN Secretary-General Ban Ki-moon,⁴⁴ and World Bank President Jim Kim⁴⁵ — also justify women’s rights as a means of pursuing the common good.

An important backdrop of the debate over women’s representation in peace and security is the broad, pioneering feminist critique of international law that Hilary Charlesworth, Christine Chinkin, and Shelley Wright wrote twenty-five years ago.⁴⁶ Their claim that international law and institutions are infused with inherent gender biases — normatively, structurally, and in terms of representation — was nothing less than path-breaking and remains salient even as women make progress on the international stage.⁴⁷ Faced with discrimination, violence, and other violations from state and non-state actors, women and girls in many parts of the world continue to face major obstacles to attending school, securing economic parity, and obtaining protection from forced marriage and trafficking, among other hardships.

The Security Council responded to the emergence of feminist international law criticism and related developments in the 1990s⁴⁸ by adopting Resolution 1325, the first in a series of resolutions⁴⁹ in which the Council sought to address the underrepresentation of women and

⁴³ See, e.g., PRESIDENT BARACK OBAMA, NAT’L SEC. STRATEGY 38 (2010) (“Experience shows that countries are more peaceful and prosperous when women are accorded full and equal rights and opportunity.”); see also PRESIDENT BARACK OBAMA, NAT’L SEC. STRATEGY 20 (2015) (“Recognizing that no society will succeed if it does not draw on the potential of all its people, we are pressing for the political and economic participation of women and girls”)

⁴⁴ Secretary-General’s Remarks to Security Council Open Debate on Women, Peace and Security (Oct. 13, 2015) (noting that Resolution 1325 “underscored the pivotal link between gender equality and international peace and security”), <http://www.un.org/sg/statements/index.asp?nid=9134>.

⁴⁵ See, e.g., Jim Kim, Remarks: Financing for Gender Equality – Results and Good Practices (July 1, 2015) (“At the World Bank Group, we are finalizing a new gender strategy. A centerpiece of that plan will be developing and sharing knowledge about gender equality as a critical pathway to achieving our twin corporate goals: ending extreme poverty by 2030 and boosting shared prosperity.”). For additional commentary, see the 2012 World Bank Report, which largely focuses on the instrumental justification for gender equality as being “smart economics,” even while acknowledging that “[g]ender equality is a core development objective in its own right.” WORLD BANK, WORLD DEVELOPMENT REPORT: GENDER EQUALITY AND DEVELOPMENT, at xx (2012).

⁴⁶ Hilary Charlesworth, Christine Chinkin & Shelley Wright, *Feminist Approaches to International Law*, 85 AM. J. INT’L L. 613 (1991).

⁴⁷ See, e.g., NO CEILINGS, *supra* note 3 (discussing progress and remaining gaps in gender equality).

⁴⁸ See *supra* note **Error! Bookmark not defined.** and accompanying text.

⁴⁹ The Security Council adopted subsequent resolutions addressing women, peace and security concerns, as follows: S.C. Res. 1820 (June 19, 2008) (recognizing sexual violence in conflict as a matter of international security); S.C. Res. 1888 (Sept. 30, 2009) (providing mechanisms to strengthen the implementation of S.C. Res. 1820, including the appointment of a UN Special Representative of the Secretary-General on Sexual Violence in Conflict); S.C. Res. 1889 (Oct 5, 2009) (calling for further steps to address women’s participation, particularly in post-conflict planning and peace building); S.C. Res. 1960 (Dec. 16, 2010) (calling for additional monitoring and measures to address conflict-related sexual violence, including the deployment of more women in peacekeeping as well as more training for peacekeepers in gender-based and sexual violence); S.C. Res. 2106 (June 24, 2013) (addressing accountability

marginalization of gender concerns in peace and security. This Article explores claims about gender representation in the WPS field in two ways. On one level, it explores the claim that increasing the *representation* of women in developing peace agreements strengthens the sustainability of these agreements. On a deeper level, the Article examines the assumption underlying this claim: that the way women *represent themselves* — the way women “perform” — in matters of peace and security is different from the way men perform. Just as gender representation has been long debated in the context of U.S. domestic law on gender composition of leadership positions in corporations,⁵⁰ on courts,⁵¹ and in government more generally,⁵²

for perpetrators of sexual violence in conflict); S.C. Res. 2122 (Oct. 18, 2013) (addressing the persistent gaps in the implementation of the women, peace and security agenda); and S.C. Res. 2242 (Oct. 13, 2015) (addressing women’s roles in countering violent extremism and terrorism and recommending improvements in the Council’s and the UN’s own working methods in relation to women, peace and security).

⁵⁰ See, e.g., Jayne M. Barnard, *More Women on Corporate Boards? Not So Fast*, 13 WM. & MARY J. WOMEN & L. 703 (2007); Lissa Lamkin Broome & Kimberly Krawiec, *Signaling Through Board Diversity: Is Anyone Listening?*, 77 U. CIN. L. REV. 431 (2008); Lynne L. Dallas, *The New Managerialism and Diversity on Corporate Boards of Directors*, 76 TUL. L. REV. 1363 (2002); Lisa M. Fairfax, *The Bottom Line on Board Diversity: A Cost-Benefit Analysis of the Business Rationales for Diversity on Corporate Boards*, 2005 WIS. L. REV. 795; Donald J. Polden, *Forty Years After Title VII: Creating an Atmosphere Conducive to Diversity in the Corporate Boardroom*, 36 U. MEM. L. REV. 67 (2005). On racial diversity, see Sung Hui Kim, *The Diversity Double Standard*, N.C. L. REV. (2011); Steven A. Ramirez, *Games CEOs Play and Interest Convergence Theory: Why Diversity Lags in America’s Boardrooms and What to Do About It*, 61 WASH. & LEE L. REV. 1583 (2004); cf. David B. Wilkins, *From “Separate Is Inherently Unequal” to “Diversity is Good for Business”: The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548 (2004).

⁵¹ See, e.g., Theresa M. Beiner, *What Will Diversity on the Bench Mean for Justice?*, 6 MICH. J. GENDER & L. 113 (1999); Christina L. Boyd, Lee Epstein, & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389 (2010); Kate Malleson, *Justifying Gender Equality on the Bench: Why Difference Won’t Do*, 11 FEM. LEG. STUD. 1 (2003); Patricia M. Wald, *Six Not-So-Easy Pieces: One Woman Judge’s Journey to the Bench and Beyond*, 36 U. TOLEDO L. REV. 979, 989 (2005); see also Judith Resnik, *Gender Bias: From Classes to Courts*, 45 STAN. L. REV. 2195 (1993).

⁵² See, e.g., Steven Hill, *Why Does the U.S. Still Have So Few Women in Office?*, NATION (March 7, 2014), <http://www.thenation.com/article/why-does-us-still-have-so-few-women-office/>.

analogous questions are being raised in the fields of international law, comparative studies, and international organizations.⁵³

B. Why So Few Women?

One study of 31 major peace processes between 1992 and 2011 found that only 9% of negotiators and 2% of chief mediators were women.⁵⁴ Between 1990 and 2010, only 7% of agreements in which the UN was a third party referenced women.⁵⁵ Rather than including women and other constituents who might pave the way to lasting peace, men from the warring parties often begin peace processes by granting amnesties to each other for rape and other sexual

⁵³ For discussion of gender representation in international institutions, see, for example, Nienke Grossman, *Shattering the Glass Ceiling in International Adjudication*, 56 VA. J. INT'L L. (forthcoming 2016) [hereinafter Grossman, *Shattering the Glass Ceiling*]; Nienke Grossman, *Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts?*, 12 CHI. J. INT'L L. 647 (2012) [hereinafter Grossman, *Sex on the Bench*]; Fionnuala Ní Aoláin, *supra* note 7 (reflecting on and offering a conceptual framing for Professor Ní Aoláin's own candidacy for a judgeship on the European Court of Human Rights); Gqual, *The Current Composition of International Tribunals and Monitoring Bodies* (Sept. 14, 2015), <http://www.gqualcampaign.org/1626-2/>; and Viviana Kristicevic, *Gqual Campaign for Gender Parity in International Representation* (2015) (on file with author).

For comparative discussion of gender representation in government and the question of quotas, see, for example, Suk, *Gender Parity and State Legitimacy*, *supra* note 16 (discussing state and corporate quotas in Europe); and Isobel Coleman, *Are Quotas for Women in Politics a Good Idea*, ATLANTIC (Jan. 11, 2012), <http://www.theatlantic.com/international/archive/2012/01/are-quotas-for-women-in-politics-a-good-idea/251237/> (discussing parliamentary quotas in the Middle East and North Africa).

For comparative discussion of gender representation on corporate boards and the question of quotas, see, for example, Suk, *supra*; and Darren Rosenblum & Daria Roithmayr, *More Than a Woman: Insights into Corporate Governance After the French Sex Quota*, 48 IND. L. REV. 889 (2015).

⁵⁴ UN WOMEN, WOMEN'S PARTICIPATION IN PEACE NEGOTIATIONS: CONNECTIONS BETWEEN PRESENCE AND INFLUENCE 3 (2d ed. 2012).

⁵⁵ Christine Bell & Catherine O'Rourke, *Peace Agreements or Pieces of Paper? The Impact of UNSC Resolution 1325 on Peace Processes and their Agreements*, 59 INT'L & COMP. L. Q. 941, 957 (2010). According to a recent report commissioned by the UN, the number of references to gender in peace agreements increased after the adoption of Resolution 1325, particularly in processes supported by the UN itself:

Between 1990 and 2000, when the Security Council adopted 1325, just 11 per cent of peace agreements signed included a reference to women. Since the adoption of resolution 1325, 27 per cent of peace agreements have referenced women. Of the six agreements resulting from peace talks or national dialogue processes supported by the UN in 2014, 67 per cent contained references relevant to women, peace and security.

Coomaraswamy et al., *supra* note 15, at 14.

violence used as weapons of war — tantamount to “men with guns . . . forgiving other men with guns for crimes committed against women.”⁵⁶

Why is the underrepresentation of women in peacemaking important? By and large, women experience war differently from men and bring different perspectives to peace and security issues. These differences are largely socially constructed. The “hyper”-masculine⁵⁷ terrain of war “persists notwithstanding the [modest] increased presence of women in military forces both state and non-state.”⁵⁸ While men comprise the majority of combatants and are more likely to be killed as a direct consequence of war, “[w]omen are more likely to die from war’s indirect effects after conflict ends — from causes relating to the breakdown in social order, human rights abuses, economic devastation, and the spread of infectious diseases.”⁵⁹ Even aside from being the predominant targets of sexual violence that occurs during armed conflict, women experience domestic violence at higher rates during times of conflict.⁶⁰ In fact, “levels of rape and domestic violence remain extremely high in postconflict settings, as demobilized fighters primed to use force confront transformed gender roles at home or the frustrations of unemployment.”⁶¹

Despite the significance these different experiences could hold for formal peace processes, the peacemaking landscape has constructed multiple barriers to the participation of women. In reality, peacemaking reaches beyond the ceasefires and division of territory found in

⁵⁶ Donald Steinberg, *Peace Missions and Gender: Full Engagement of Women Holds the Key*, OSCE MAGAZINE 12 (July – Aug. 2009), <http://www.osce.org/secretariat/37702?download=true>. Note also that women are under-represented in aspects of peacemaking at the international level – within UN Headquarters (for example, in the Department of Peacekeeping Operations and the Department of Political Affairs) as well in the field (for example, as peacekeepers on the ground). For a comprehensive picture, see Coomaraswamy et al., *supra* note 15.

⁵⁷ Fionnuala Ní Aoláin & Naomi Cahn, *Gender, Masculinities, and Transition in Conflicted Societies*, 44 NEW ENG. L. REV. 101 (2009).

⁵⁸ Fionnuala D. Ní Aoláin, *Advancing Women’s Rights in Conflict and Post-Conflict Situations*, 104 AM. SOC’Y INT’L L. PROC. 568, 570 (2010).

⁵⁹ MARIE O’REILLY, ANDREA Ó SÚILLEABHÁIN & THANIA PAFFENHOLZ, REIMAGING PEACEMAKING: WOMEN’S ROLE IN PEACE PROCESSES 5 (2015), <https://www.ipinst.org/wp-content/uploads/2015/06/IPI-E-pub-Reimagining-Peacemaking-rev.pdf>; *see also* KATHLEEN KUEHNAST, CHANTAL DE JONGE OUDRAAT & HELGA HERNES, WOMEN AND WAR: POWER AND PROTECTION IN THE 21ST CENTURY (2011); Thomas Pluemper & Eric Neumeyer, *The Unequal Burden of War: The Effect of Armed Conflict on the Gender Gap in Life Expectancy*, 60 INT’L ORG. 723 (2006).

⁶⁰ WORLD BANK, GLOBAL MONITORING REPORT: PROMOTING GENDER EQUALITY AND WOMEN’S EMPOWERMENT, (2007); Erin Mooney, *The Concept of Internal Displacement and the Case for Internally Displaced Persons as a Category of Concern*, 24 REFUGEE SURVEY QUARTERLY (October 2005); Lori Heise & Claudia Garcia-Moreno, *Violence by Intimate Partners*, in WORLD REPORT ON VIOLENCE AND HEALTH 100 (Etienne G. Krug et al. eds., 2002); Jose V. Gallegos & Italo A. Gutierrez, *The Effect of Civil Conflict on Domestic Violence: The Case of Peru*, (Working Paper, Aug. 3, 2011), <http://ssrn.com/abstract=1904417>.

⁶¹ O’REILLY ET AL., *supra* note 59, at 5; *see also* JACQUI TRUE, THE POLITICAL ECONOMY OF VIOLENCE AGAINST WOMEN 149 (2012).

formal agreements. Peacemakers need to also lay the foundation for post-conflict society and to shape its structures.⁶² However, for the most part, it is the belligerents who decide both the former and the latter, rather than those who worked for peace, did not take up arms, or “whose priorities for a peaceful society may [otherwise] differ.”⁶³ This approach views the goal of a peace process as the end of violence, and thus women – who are rarely combatants — are not likely to be seen as relevant or legitimate participants. But if the objective is to build peace, then other relevant representatives in society—including women—and a broader timeline are necessary.⁶⁴

To understand why the peacekeeping landscape is so gendered, consider Christine Bell’s conceptualization of a three-stage process for peace negotiations to eliminate conflict: “pre-agreement,” “framework,” and “implementation” phases.⁶⁵ As Fionnuala Ní Aoláin reminds us, Resolution 1325 and subsequent Security Council resolutions broadly emphasize the formal framework phase of peace negotiations geared toward ending hostilities — a focus which ignores feminist insights “about the impact (generally negative) that informal legal processes have on women’s lives.”⁶⁶ By focusing on the formal framework phase, such peace processes predominately emphasize “rehabilitation of the public political and legal spheres, thereby ignoring the private realm — and (re) entrenching a public/private divide in many post-conflict societies, the limitations of which feminists have long exposed.”⁶⁷ While a goal of internationalizing peace processes has been to involve multilateral institutions and other states as a way of supporting indigenous women’s rights and other rule of law efforts, in practice internationalization can also serve to reinforce local biases.⁶⁸

The fact that most international interest is directed toward the “framework” agreement phase obscures the significance of deals made in the “pre”-agreement stage, such as ceasefire agreements and “in principle” agreements.⁶⁹ While such agreements can deeply prefigure what will be included in eventual binding peace agreements (for example, by establishing facts on the ground), this phase “tends to be dominated by military actors and is deeply masculine in representation and culture.”⁷⁰ Moreover, the rise in recognition of non-state actors in

⁶² O’REILLY ET AL, *supra* note 59, at 1.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ CHRISTINE BELL, ON THE LAW OF PEACE: PEACE AGREEMENTS AND THE LEX PACIFICATORIA (2008).

⁶⁶ Ní Aoláin, *supra* note 58, at 569.

⁶⁷ *Id.* See also Charlesworth et al., *supra* note 46.

⁶⁸ Ní Aoláin, *supra* note 58, at 569.

⁶⁹ *Id.*

⁷⁰ *Id.* See also Ní Aoláin et al., *supra* note 57.

international law has enlarged the role for non-state armed groups in the pre-agreement and other phases, even as the role of the UN has declined due to a shifting mediation landscape and proliferation of mediation organizations that have undercut the UN's influence in implementing Resolution 1325.⁷¹ While governments resisted negotiating with non-state armed groups during the Cold War, with the growth in the number of civil wars in the 1990s and research on the positive effects of the inclusion of such non-state groups, their participation is now the “new normal.”⁷² Inclusion of *unarmed* non-state actors as the next paradigm shift could help secure buy-in from constituencies beyond the armed groups in conflict, “who themselves may have little legitimacy among the citizens.”⁷³

Yet even where the UN is able to exercise influence, parties to a conflict often face many competing demands, including the pressure of ending hostilities quickly, sometimes within short timeframes imposed by the UN Security Council itself. This pressure undermines efforts to take a more inclusive approach that could reach a broader set of participants.⁷⁴ Plus, while Resolution 1325 may have incrementally impacted the representation of women in formal peace negotiations, if the real work of peace has already occurred in the pre-agreement phase, then the presence of women may just obscure the fact that outcomes have been determined beforehand.⁷⁵

While the content of agreements may be determined in the framework phase of the formal model, the real content of peace agreements is frequently “diverted out from the formal negotiations context to the ‘implementation’ stage.”⁷⁶ Formal agreements cannot flesh out all of the elements of reconstruction and reform — legal, political, economic, and social — that are necessary in a society emerging from violent conflict.⁷⁷ Although diverse as a group, women often assert “different security needs and priorities for peace [that] challenge the dominant understanding of peace and security[,] which remains largely focused on state security” instead of human security.⁷⁸

If women are not engaged in the implementation phase, they cannot meaningfully participate in addressing the harms that women experience during conflict, including rape, other

⁷¹ See O'REILLY ET AL., *supra* note 59, at 7 (surveying scholarly discussion of “[t]he increased number of actors involved in mediation and a proportionally reduced role for the UN” and noting that terrorism and “militarized responses to violent extremism [have] clos[ed] the space for mediation in many parts of the world”).

⁷² *Id.* at 8.

⁷³ *Id.* (parentheses omitted).

⁷⁴ *Id.* at 6.

⁷⁵ Ní Aoláin, *supra* note 58, at 569.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ O'REILLY ET AL., *supra* note 59, at 1.

forms of sexual assault, forced impregnation, the loss of family members, and expanded care responsibilities.⁷⁹ Furthermore, when war ends, funder fatigue sets in for international donors, often leading to less funding for women's groups and other civil society organizations in the post-conflict phase.⁸⁰ This can "undercut the capacity for women either to hold the gains made in formal agreements, or advance the protections needed for women in this critical legal and political phase."⁸¹ All in all, failure to account for the gendered nature of conflict at every stage has significant implications for the success of the transition from conflict to peace in general. Thus, greater account must be taken of "the impact of violent masculinities on disarmament, demobilization, and reintegration programs."⁸²

In fact, "traditional gender dichotomies may be further entrenched and exacerbated during times of extreme violence," and women are at risk of remaining "subordinated by dominant discourses that minimize or ignore [their] needs and views," despite research demonstrating the relationship between a more inclusive approach and ending conflict.⁸³

C. The Relationship Between Women's Participation and Prospects for Peace

Deploying a mixed methodology, this Section examines new quantitative and qualitative work that investigates the relationship between women's involvement in peacemaking and the prospects for securing sustainable peace. The research reflects that when women are selected — based on a broader notion of what constitutes relevant qualifications — their involvement is *correlated* with a greater likelihood of gender-sensitive outcomes and sustainable peace agreements, though *causation* remains unclear.

While much of the writing on WPS has been primarily normative or based on more limited quantitative research, a recent report by the International Peace Institute (IPI)⁸⁴ summarizes both (1) new statistical research based on 182 peace agreements,⁸⁵ and (2) a multi-

⁷⁹ Ní Aoláin, *supra* note 58, at 569.

⁸⁰ Catherine Powell, *Women and Girls in the Afghanistan Transition* 15 (Council on Foreign Relations, Working Paper, 2014) (noting cuts in U.S. funding to education in Afghanistan as the U.S. reduced its military presence in Afghanistan and the war there wound down); *see also* Emma Graham-Harrison, *Afghan Educators Struggle for Funding as US Aid Budget Shrinks*, GUARDIAN (Aug. 18, 2013), <http://www.theguardian.com/world/2013/aug/18/afghanistan-educators-funding-us-aid>; *Afghanistan: Military Drawdown Could Hit Aid Flows*, IRIN, May 14, 2014 (noting a humanitarian worker observing that "[w]e saw a drop in humanitarian assistance in Iraq and Kosovo after the inter-national military forces withdrew").

⁸¹ Ní Aoláin, *supra* note 58, at 570.

⁸² *Supra* note 57, at 101.

⁸³ Ní Aoláin, *supra* note 58, at 570.

⁸⁴ O'REILLY ET AL., *supra* note 59, at 10 (discussing methodology).

⁸⁵ *Id.* at 12-13 (summarizing the unpublished work of Laurel Stone, research associate for policy studies at University of Notre Dame's Kroc Institute for International Peace Studies); *id.* at 34 (detailing Stone's statistical analysis and methodology, based on a new dataset she created "that measures whether or not one or more women

year research project, involving forty in-depth case studies across regions and supported by interviews with experts directly involved in peace and security.⁸⁶ The report confirms that not only do women and men “tend to experience conflict differently,” but “their priorities for peace frequently differ.”⁸⁷ In fact, other studies also demonstrate that women are more likely than men to raise issues like human rights, justice, health, and employment in peace negotiations—issues that are important to sustainable peace.⁸⁸

Women often bring to the table issues that relate to *human* security. In emphasizing “positive” peace (or the “absence of structural violence”), women are expanding the traditional conception of “negative” peace (or “the absence of armed conflict . . . which prioritizes state security”).⁸⁹ According to the research, this difference in perspective, as well as the mobilization work that women undertake based on this perspective, is correlated with a greater likelihood that peace agreements will be implemented.⁹⁰ However, while this research lends support to the idea that women’s participation in peacemaking is correlated with more durable peace agreements, the data suffer from limitations and the case studies are incomplete.

participated in peace talks occurring between 1989 and 2011, using data from Uppsala University’s Peace Agreement Dataset, UN Women’s reports on women in peace processes, and multiple case studies”). For the dataset, see UCDP Peace Agreement Dataset v. 2.0, 1975-2011, www.pcr.uu.se/research/ucdp/datasets/ucdp_peace_agreement_dataset/.

⁸⁶ O’REILLY ET AL., *supra* note 59, at 10-12, 13-33 (summarizing the research of the Broadening Participation Project at the Graduate Institute of International Development Studies in Geneva, a project led by Thania Paffenholz); *see also Main Results of ‘Broader Participation in Political Negotiations and Implementation’ Project 2011–2015*, GRADUATE INST. GENEVA (April 2015), <http://repository.graduateinstitute.ch/record/292673/files/briefingpaperbroader%20participation.pdf>.

⁸⁷ O’REILLY ET AL., *supra* note 61, at 6.

⁸⁸ *See, e.g.*, INT’L CRISIS GROUP, *BEYOND VICTIMHOOD: WOMEN’S PEACEBUILDING IN SUDAN, CONGO, AND UGANDA* (2006), <https://www.crisisgroup.org/africa/horn-africa/sudan/beyond-victimhood-womens-peacebuilding-sudan-congo-and-uganda>.

⁸⁹ O’REILLY ET AL., *supra* note 61, at 6. The report notes:

In fact, quantitative analysis shows that women’s security and positive peace are intertwined: . . . women’s physical security and gender equality in society correlate with broader peace and stability in states. While the causal direction remains unclear, quantitative analysis shows that women are more likely to face rape, domestic violence, and other physical threats in states with high rates of conflict, crime, and instability, and in those that have poor relations with their neighbors or with the international community. Similarly, states are less likely to be peaceful if their family laws favor men or gender discrimination is prevalent in practice, despite equality under the law.

Id. (citing VALERIE HUDSON, BONNIE BALLIF-SPANVILL, MARY CAPRIOLI & CHAD F. EMMETT, *SEX AND WORLD PEACE* (2012)).

⁹⁰ *Id.* at 11 n.61 (“An agreement is defined as being fully implemented when at least 80 percent of its relevant provisions were implemented; an agreement is defined as partially implemented when at least some of the key provisions have been implemented.”).

1. Quantitative Analysis

The statistical data in the IPI report measure the participation of women as mediators, negotiators, witnesses, and signatories to 182 peace agreements signed between 1989 and 2011, as well as the duration of the peace achieved through those agreements.⁹¹ These data suggest that women's participation has a statistically significant, positive correlation with the duration of peace.⁹² In the short run, when women were included in a peace process, the resulting peace agreement was twenty percent more likely to last at least two years.⁹³ This percentage only increased over time, with such agreements proving thirty-five percent more likely to last for fifteen years.⁹⁴

Surprisingly, the data also reflect that the inclusion of women's rights language in peace agreements was negatively correlated with the duration of the peace agreement, suggesting that while such "gender-sensitive language may be valuable for advancing gender equality and reducing structural violence in society (and further research is needed in this regard), the inclusion of gender provisions alone will not contribute to sustaining the peace agreement."⁹⁵ Other studies have focused on the inclusion of gender-sensitive language as a proxy for women improving the prospects for peace. The findings in this data, however, demonstrate "that gender provisions in a peace agreement should not be conflated with women's participation in a peace process"⁹⁶ without further exploration of the connection between the two.

In an effort to control for other variables, the IPI study concedes that women's participation was only one significant predictor of peace outcomes. Another variable was democracy, which also demonstrated a positive effect on the durability of peace agreements.⁹⁷ In fact, since "[d]emocracy and women's participation are often linked," this result may indicate that "societal equality and good governance together encourage a lasting peace."⁹⁸ The study concedes that causation can move either way: "democracy could aid gender equality in a conflict-affected country or the presence of a woman could facilitate the inclusion of democratic principles in the agreement."⁹⁹

⁹¹ *Id.* at 12.

⁹² *Id.*

⁹³ *Id.* at 34.

⁹⁴ *Id.*

⁹⁵ *Id.* at 13.

⁹⁶ *Id.*

⁹⁷ *Id.* at 34.

⁹⁸ *Id.*

⁹⁹ *Id.*

Overall, the quantitative analysis in the IPI report is illuminating and suggests there is a statistical correlation between women's participation and durable peace. However, the study has a number of limitations. While women's participation is *correlated* with more sustainable peace, *causation* has not been clearly demonstrated. Moreover, the study does not control for other significant factors, such as the presence of democracy. Additionally, the analysis "does not capture the number of women involved in each case nor what the extent of their involvement was."¹⁰⁰ To further examine the specific impact of women's participation in peace processes on the durability of peace, the IPI study also provided results of a qualitative study.

2. Qualitative Analysis

Analyzing case studies of women's participation helps to flesh out the dynamics behind the numbers. Studies of international institutions and mechanisms tend to foreground the "input" and "output" of these processes, and focus less on what actually goes on within them.¹⁰¹ Comparative analysis of WPS has brought fresh attention to the operation of peace processes across the globe.

The qualitative analysis in the IPI report involves a comparative case study approach based on examination of forty peace negotiations and political transitions and supported by interviews of individuals involved in peace processes in the countries examined.¹⁰² The project considers the impact of organized constituencies of women across negotiations, along with the impact of other distinct groups, including armed groups, political parties, and religious groups. Unlike the quantitative research, this qualitative study explores the impact of organized women's groups, networks, or coalitions on peace or transition processes, as distinct from the role of *individual* women as negotiators and mediators, "since there is some evidence to suggest that women's groups are more likely to raise concerns that are distinct from the belligerents' priorities or specifically relevant to women."¹⁰³ The report assesses the impact of women's participation in terms of both the quality and sustainability of peace agreements. For the purposes of the study, quality refers to the extent to which "the causes and effects of conflicts are addressed in the agreement."¹⁰⁴ Sustainability of peace agreements is understood as the extent to which "the provisions addressing these quality factors are implemented, and to what extent violence is reduced."¹⁰⁵

¹⁰⁰ *Id.*

¹⁰¹ Michael N. Barnett & Martha Finnemore, *The Politics, Power, and Pathologies of International Organizations*, 53 INT'L ORG. 699, 701 (1999).

¹⁰² O'REILLY ET AL., *supra* note 59, at 10-33.

¹⁰³ *Id.* at 10 (discussing the methodology).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* See also discussion *supra* note 90.

The project identified seven models of inclusion, listed here in decreasing order of direct involvement with the official peace process and with examples of successful case studies in brackets:

- (1) **Direct participation at the negotiation table:** direct involvement in official peace talks or in national dialogues on peacemaking, constitution making, or institutional reform [e.g., Northern Ireland Women's Coalition (Northern Ireland)];
- (2) **Observer status:** a more informal mechanism, allowing selected groups to serve as communication conduits to a wider audience but without formal status [e.g., Mano River Women's Peace Network (Liberia)];
- (3) **Consultations:** allowing groups a broader sense of ownership over (and input into) the process but not allowing them to participate directly in the talks [e.g., Assembly of Civil Society's interest group on women (Guatemala)];
- (4) **Inclusive commissions:** established after peace agreements to implement major provisions on, for example, the constitution, transitional justice, and cease-fire monitoring [e.g., Truth, Justice, and Reconciliation Commission's gender quotas (Kenya)];
- (5) **Problem-solving workshops:** provides a means for representatives close to leaders of conflicting parties to meet unofficially, without pressure to reach an agreement. This model rarely includes women, as proximity to decision makers is often key in selection [e.g., workshop to prepare 64 women for direct participation in the Inter-Congolese Political Negotiations (Democratic Republic of Congo)];
- (6) **Public decision making:** referenda and other elective mechanisms to put major political decisions to binding public votes [e.g., women's groups' essential role in building support for the referendum over the Good Friday Agreement in 1998 (Northern Ireland)];
- (7) **Mass action:** campaigns, demonstrations, street action, protests, and petitions, which can support or oppose positions in peace negotiations [e.g., businesswoman spearheaded a group of likeminded business leaders, Sri Lanka First, and organized a massive demonstration with partner organizations that contributed significantly to pressure on political leaders to begin negotiations with the Liberation Tigers of Tamil Eelam (Sri Lanka)].¹⁰⁶

The case studies revealed several important lessons. First, women's groups are more likely to contribute to sustainable peace where a combination of models of inclusion is used – not only by including women in formal negotiations, but also through other formal and informal

¹⁰⁶ O'REILLY ET AL., *supra* note 59, at 1, 13-19; *see also* Thania Paffenholz, *Civil Society and Peace Negotiations: Beyond the Inclusion-Exclusion Dichotomy*, NEGOTIATION J. 69, 76-88 (2014).

mechanisms related to the peace process.¹⁰⁷ To illustrate this point, the study contrasts two negotiation processes that spanned several decades in the Philippines. One negotiation – between the Philippine government and the communist-leaning National Democratic Front (NDF) – included women who were wives of NDF leaders but otherwise had little legitimacy participating as negotiators.¹⁰⁸ The parties agreed to a 2011 Oslo Joint Statement that involved an unconventional instance of women’s involvement as direct participants at the negotiating table. In fact, the negotiations had the highest percentage of women delegates among a pool of thirty-one major peace processes between 1992 and 2011, according to a study by UN Women.¹⁰⁹ However, after the signing of the Oslo Joint Statement, the talks stalled, partly due to disputes over security and immunity guarantees.¹¹⁰ Even though the NDF contended that it had committed to principles of gender representation in appointing representatives, critics argued that women were not, in fact, meaningful participants in the peace negotiations.¹¹¹ The IPI study notes that “women nominated to a process to represent a particular conflict party may be unlikely to express the kinds of distinct and diverse perspectives on the process and the priorities for peace that women coming from other backgrounds have so often offered.”¹¹² More broadly, the NDF’s team of representatives included male “leaders” who, while known to the government, were no longer viewed as having legitimacy or power in the eyes of most NDF members. Thus, the process “lacked buy-in from key constituencies and spoilers, and had limited influence over the NDF’s operations on the ground.”¹¹³

By contrast, another negotiation – between the Philippine government and the Muslim-separatist Moro Islamic Liberation Front (MILF) – included both direct participation of women in negotiations and participation of women as observers in a national dialogue, a transition commission, and through mass action. On either side of the table, the women representatives “had both technical qualifications and extensive experience as civil society advocates who led mass action groups and campaigns,” and they were able to secure additional roles for women, both in the formal process and more inclusive platforms.¹¹⁴ According to participants in the talks, when women played leadership roles in discussing particular issues, there were new dynamics in the talks, as well as a stronger push to bring in more women representatives on the MILF side of

¹⁰⁷ See O’REILLY ET AL., *supra* note 59, at 26.

¹⁰⁸ *Id.* at 20-21 (citing INT’L CIVIL SOC’Y ACTION NETWORK, NEGOTIATING A BETTER PEACE: WOMEN AND CIVIL SOCIETY AT THE TABLE (2014), <http://www.icanpeacework.org/wp-content/uploads/2014/06/full-CN-FINAL.pdf>).

¹⁰⁹ UN WOMEN, *supra* note 54, at 7 (cited in O’REILLY ET AL. *supra* note 59, at 20 n.107).

¹¹⁰ O’REILLY ET AL., *supra* note 61, at 20.

¹¹¹ *Id.*

¹¹² *Id.* at 20-21.

¹¹³ *Id.* at 21 (citing Interview by Marie O’Reilly and Andrea Ó Súilleabháin with Irene Santiago, in N.Y. (Sept. 25, 2014)).

¹¹⁴ *Id.* at 23.

the table. Women on both sides worked together to ensure gender equality guarantees in the agreement.¹¹⁵ A Comprehensive Agreement was reached in 2014, and “[t]he adopted text includes several clauses that promote gender equality and women’s participation in public life.”¹¹⁶

Despite the record number of women representatives involved in the earlier peace process in the Philippines, its relative lack of success reflects the fallacy of thinking that merely increasing the number of women participants will, on its own, produce a better or more durable agreement. As the IPI study concludes, “merely involving more female participants at the peace table is no substitute for women’s influential participation,” as “women’s participation alone cannot overcome larger legitimacy issues, if those at the peace table are not accepted as representatives by their own constituencies.”¹¹⁷

A second lesson from the IPI report’s qualitative analysis is that when individual women are selected to participate in formal negotiations on behalf of one of the conflicting parties, they may not represent the interests of women more broadly or have a positive effect on securing an agreement. By contrast, when women are selected based on qualifications that include past work in peace or leadership of constituencies of women, they are more likely to push for peace agreements with broader buy-in and legitimacy, enhancing the sustainability of the agreements. Women’s involvement is also more likely to secure women’s rights, leading to even greater peace and prosperity and creating a virtuous circle. This contrast is demonstrated by the two different negotiations in the Philippines described above.

A third lesson is that, at least when they are represented in small numbers, women’s influence is far reduced in deliberative processes based on majority rule.¹¹⁸ By contrast, a consensus model enhances the influence women can exert.¹¹⁹ But the risk of “gender capture”¹²⁰ is frequently present, given the fact that men are predominant in positions of power within organizational structures, both historically and currently.

¹¹⁵ *Id.* (quoting Interview by N-Peace Network with Miriam Coronel-Ferrer (Oct. 27, 2014)).

¹¹⁶ *Id.* at 23-24. For further information on the Philippines case study, see PATTY CHANG ET AL., GEO. INST. FOR WOMEN, PEACE, AND SEC., WOMEN LEADING PEACE 70 (2015); Anne Marie Goetz & Rob Jenkins, *Taking Stock: Protection Without Empowerment: The Evolution of Women, Peace, and Security Since the Beijing Platform for Action*, in WOMEN AND GIRLS RISING 68, 77 (Ellen Chestler & Terry McGovern eds., 2015) (noting the large role women in the Philippines played in resolving the conflict and in post-conflict institutions).

¹¹⁷ O’REILLY ET AL., *supra* note 59, at 21.

¹¹⁸ *Id.* at 29.

¹¹⁹ KARPOWITZ & MENDELBERG, *supra* note 12 (noting that efforts to increase and improve the representation of women will often fall short unless they also address institutional rules that impede women’s voices).

¹²⁰ Ann Marie Goetz, *Gender Justice, Citizenship and Entitlements: Core Concepts, Central Debates and New Directions for Research*, in GENDER JUSTICE, CITIZENSHIP AND DEVELOPMENT 16 (Maitrayee Mukhopadhyay & Navsharan Singh eds., 2007).

A fourth lesson is that women are more likely to assist in building sustainable peace when there are robust women's coalitions with expertise in peace, human rights, and bridging sectarian and other divides.¹²¹ This was clearly demonstrated by the contrast between the two peace processes in the Philippines, where such women's coalitions were active in the negotiations with MILF.

Overall, the lessons drawn from the qualitative research indicate that the participation of individual women in itself may not necessarily impact peace processes. The Philippines case study in particular demonstrates that merely having women at the negotiating table does not by itself produce a higher-quality or more durable agreement. Women participants must have influence and experience, and the structure of their participation must ensure meaningful input.

II. Existing Theoretical Frames

As has been the case in debates about gender representation in U.S. law, women's participation in the development of peace agreements has been justified by both moral and instrumentalist accounts of equality theory. The prevailing views in the WPS debate are what I refer to as an antisubordination (or moral) account and a securitization (or instrumentalist) account.

This Part draws on literature concerning gender representation – both in the WPS context and more broadly – to investigate the antisubordination and securitization accounts of women's participation in peacemaking. For each account, this Part explores (1) the ways the theoretical framework justifies increasing women's participation, as well as (2) the shortcomings of the account.

A. Antisubordination Account

1. The Rationale

The antisubordination account in support of women's participation in peace negotiations posits that their participation is morally justified as a matter of equality, fairness, human dignity, and challenging male dominance. Often invoked in contrast to the anticlassification (or color-blind/gender-blind/formal equality) principle, the antisubordination principle provides a substantive account of equality, which “contend[s] that guarantees of equal citizenship cannot be realized under conditions of pervasive social stratification and argue[s] that law should reform institutions and practices that enforce the secondary social status of historically oppressed groups.”¹²² As outlined by Owen Fiss and subsequent scholars in U.S. constitutional law, the

¹²¹ O'REILLY ET AL., *supra* note 59, at 14, 23, 26 (discussing Northern Ireland and the Philippines as successful models and distilling lessons learned overall).

¹²² Balkin & Siegel, *supra* note 14, at 9. By contrast, the anticlassification principle asserts that the government may not formally classify people – either explicitly or surreptitiously – on the basis of a forbidden category such as race or gender, but fails to adequately address de facto or secondary generation discrimination. *Id.*

antisubordination concept “is variously called the antisubordination principle, the antisubjugation principle, the equal citizenship principle, or the anticaste principle.”¹²³

Catharine MacKinnon and other scholars have adapted antisubordination theory in the context of global sex equality. In a recent paper, *Sex Equality in Global Perspective*, MacKinnon expands her earlier work on gender hierarchy globally.¹²⁴ After noting that U.S. law “remains mired” and “in the grip of . . . [t]raditional formal equality theory, predicated on Aristotle’s formulation [of] treating ‘likes alike, unlikes unlike,’” she argues that this sameness/difference approach is “more tenacious elsewhere than is usually recognized, predominating legally within *most nations*.”¹²⁵ While formal equality requires that women prove they are “similarly situated” to men to secure equality to men, MacKinnon notes that it is precisely those women who are most *unlike* powerful men who are most in need of equality law’s protection.¹²⁶ In contrast to formal equality, then, MacKinnon’s account of substantive equality “aims to eliminate systemic patterns of group advantage and disadvantage—i.e. hierarchies of social dominance and subordination.”¹²⁷

As applied to WPS, an antisubordination framework calls for a deep account of gender equality and cautions against the lingering effects of patriarchy in, for example, the gender stratification of combat. Such an account destabilizes traditional assumptions about qualifications for peace negotiations by recognizing that the qualifications themselves have been developed through the lens of men and clouded by standards which themselves are informed by male-influenced notions of power and worth. As discussed above, when combatants are the primary negotiators, participants will be predominantly, if not exclusively, men. Beyond the military, men continue to dominate in other institutions of powers, so negotiators drawn from a

¹²³ *Id.* (citing DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987); KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* (1989); CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 32-45 (1987); CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 117 (1979) (arguing that courts should inquire “whether the policy or practice integrally contributes to the maintenance of an underclass or a deprived position because of gender status”); LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW*, §§ 16-21, at 1043-52 (1st ed. 1978); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 319 (1987)).

¹²⁴ See, e.g., Catharine A. MacKinnon, *Sex Equality in Global Perspective* (Oct. 29, 2014) (unpublished manuscript) (on file with author) (extending globally her earlier work on gender hierarchy, developed originally in the context of U.S. sex equality law, in, for example, MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 123).

¹²⁵ MacKinnon, *Sex Equality in Global Perspective*, *supra* note 124, at 1-2 (emphasis added) (citing 3 ARISTOTLE, *NICOMACHEAN ETHICS*, 1131a-1131b, 112-17 (J.L. Ackrill & J.O. Urmson eds., David Ross trans., Oxford Univ. Press 1980); Catharine A. MacKinnon, *Gender in Constitutions*, in *THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW* 397 (Michel Rosenfeld & András Sajó eds., 2012)); see also ARISTOTLE, *THE POLITICS* 307 (Benjamin Jowett trans., 1943) (“Equality consists in the same treatment of similar persons . . .”).

¹²⁶ See generally MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 123 (critiquing formal equality and theorizing a new approach to equality based on the idea that gender relations are founded on structures of dominance and subordination).

¹²⁷ MacKinnon, *Sex Equality in Global Perspective*, *supra* note 124, at 2.

pool of political or other leaders (traditionally defined) will also be predominantly men. Yet, when women are selected based on broader notions of what constitute qualifications, strong women negotiators can be identified through their past work in peace or leadership with constituencies of women—qualities recognized as valuable in securing sustainable peace agreements with broader buy-in and legitimacy.¹²⁸

In the context of WPS, the antisubordination approach draws on international human rights law, which embraces equality as a foundational right and turns on the assumption that we all have equal rights “in equal measure.”¹²⁹ Emphasizing the human rights (and by association, antisubordination) approach, a recently released UN-commissioned global study on the implementation of Resolution 1325 insists that WPS should “always be interpreted within the framework of international human rights,”¹³⁰ noting the role of women’s human rights. Of particular relevance to the antisubordination approach, the human rights framework encourages states to take affirmative action to promote equality,¹³¹ and defines “discrimination against women” to include de facto, not only de jure, discrimination.¹³² Rather than exclusively apply a formal equality approach, international human rights law advances the substantive equality approach advocated by antisubordination theorists. However, for the most part, United States constitutional law takes a more formal approach to equality.¹³³

2. Critiques

a) *The Formal Equality Challenge*

Critics of the antisubordination account of WPS call for a formal approach to equality and argue that claims for greater representation of women in peacemaking are inconsistent with the formal equality ideal that justice should be blind to gender, color, and other markers of difference. In contrast, the antisubordination approach argues that justice has never been blind, and that affirmative steps are necessary to include women in peace processes, even if those women are differently situated than men, as, for example, where women have not had a direct

¹²⁸ See *supra* Section I.C.2.

¹²⁹ LOUIS HENKIN, *THE AGE OF RIGHTS* 1-3 (1990) (tracing the foundations of the contemporary human rights idea and noting that it draws inspiration directly from the notions of inalienability and all men being created equal contained in the American Declaration of Independence). The human rights idea itself is based on the notion that each of us has certain inalienable rights, simply by virtue of our humanity—underscoring the related concept of equality in rights. *Id.* at 2.

¹³⁰ Coomaraswamy et al., *supra* note 15, at 394.

¹³¹ See, e.g., Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) arts. 4 & 5., Dec. 18, 1979, 1249 U.N.T.S. 13. Cf. International Convention on the Elimination of All Forms of Racial Discrimination (CERD) arts. 1(4) & 2(2), Mar. 7, 1966, 660 U.N.T.S. 195.

¹³² See CEDAW art. 1; see also CERD art. 1 (defining discrimination similarly for race).

¹³³ See Suk, *Quotas and Consequences*, *supra* note 16, at 231-33 (summarizing several major U.S. Supreme Court equality law cases).

role in a conflict as combatants. By rejecting the substantive equality notion that affirmative action is required to address past and continuing wrongs and structural inequality, however, formal equality requires that women prove they are similarly situated to men with whom they seek equal treatment, rather than be held to a different (presumably “lower”) standard. Because women are often excluded from combat positions and are underrepresented in prestigious military and political institutions from which peace negotiators are drawn, women are often not as “qualified” to serve in peace negotiations from a formal equality perspective, and “lowering” the bar to include women represents unfair “preferential treatment”¹³⁴ that caters to special interests.

Therefore, opponents of the antistatutory account of WPS view the inclusion of women as peace negotiators as an impermissible “quota.”¹³⁵ Such opponents draw on the belief that quotas undermine the moral worth of individuals and divide society.¹³⁶ For instance, Alexander Bickel argued that a racial quota “derogates the human dignity and individuality of all to whom it is applied; it is invidious in principle as well as in practice.”¹³⁷ Similarly, from the standpoint of such critics—as reflected by the skepticism of some of the Justices on the U.S. Supreme Court—“quotas are thought to reduce individuals to morally irrelevant groups, in contrast with forms of consideration that take the unique traits of each person into account.”¹³⁸

b) The Challenge of Politics and Bureaucracy

Even putting to one side the philosophical and legal opposition to antistatutory arguments for WPS, political and bureaucratic obstacles remain. As Hillary Clinton’s claim that women’s empowerment is not only the right thing to do, but the “smart” thing to do suggests, it is not enough to argue that promoting women’s rights is good in and of itself.¹³⁹ In fact, the very strategy Clinton used as Secretary of State to prioritize gender in foreign policy relied heavily on the argument that empowering women was “smart” policy.¹⁴⁰ Secretary Clinton realized that, in order to gain support for women’s empowerment within an otherwise male-centered, sclerotic foreign policy establishment, she would need to reframe women’s rights as a means of advancing

¹³⁴ *But see* Harris & Narayan, *supra* note 17 (challenging the notion that affirmative action is preferential treatment, because preference is built into the system, so the baseline is not neutral).

¹³⁵ O’REILLY ET AL., *supra* note 61, at 22 (quoting Interview by Marie O’Reilly and Andrea Ó Súilleabháin with Irene Santiago, in N.Y. (Sept. 25, 2014)).

¹³⁶ *See, e.g.*, ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 133 (1975) (criticizing the quota because of “its effect; a quota is a divider of society, a creator of castes”).

¹³⁷ *Id.*

¹³⁸ Suk, *Quotas and Consequences*, *supra* note 16, at 231 (characterizing this objection and summarizing the major affirmative action cases decided by the U.S. Supreme Court).

¹³⁹ *See supra* note 5 and accompanying text.

¹⁴⁰ *See* Powell, *Gender Indicators in Global Governance*, *supra* note 6, at 168.

peace and prosperity.¹⁴¹ Some observers have described this as the “Hillary Doctrine”¹⁴² and noted that it emerged early on in her tenure as Secretary of State. For example, in a TEDWomen Conference in December 2010, Clinton declared, “The subjugation of women is . . . a threat to the common security of our world and to the national security of our country.”¹⁴³

Secretary Clinton embedded this principle in the inaugural Quadrennial Diplomacy and Development Review—a strategic plan she initiated for the State Department and USAID—which weaves gender equality into almost all of its policy prescriptions, stating, for example, that “[t]he status of the world’s women is not simply an issue of morality—it is a matter of national security.”¹⁴⁴ Toward the end of her term as Secretary of State, Clinton issued gender policy guidance on mainstream women’s issues throughout the State Department, its embassies, and its posts, noting: “Countries are more peaceful and prosperous when women are accorded full and equal rights and opportunity.”¹⁴⁵ On WPS specifically, Clinton’s gender guidance asserts that “a growing body of evidence shows that women bring a range of unique experiences and contributions in decision-making on matters of peace and security that lead to improved outcomes in conflict prevention and resolution.”¹⁴⁶

¹⁴¹ See Suzanne Nossel, *A Feminist Foreign Policy: Hillary Clinton’s Hard Choices*, FOREIGN AFF. (Mar./Apr. 2016), <https://www.foreignaffairs.com/reviews/review-essay/2016-02-15/feminist-foreign-policy> (reviewing VALERIE M. HUDSON & PATRICIA LEIDL, *THE HILLARY DOCTRINE: SEX AND AMERICAN FOREIGN POLICY* (2015)), and describing one of the obstacles Clinton faced in advancing women’s rights in the State Department as the “sclerosis of the U.S. policymaking bureaucracy and the opposition and indifference of foreign governments”).

¹⁴² The notion of a “Hillary Doctrine” was perhaps first introduced by Gayle Tzemach Lemmon. See Gayle Tzemach Lemmon, *The Hillary Doctrine*, NEWSWEEK (Mar. 6, 2011), <http://mag.newsweek.com/2011/03/06/the-hillary-doctrine.html>; Gayle Tzemach Lemmon, *The Hillary Doctrine: Women’s Rights Are a National Security Issue*, ATLANTIC (Apr. 8, 2013), <http://www.theatlantic.com/sexes/archive/2013/04/the-hillary-doctrine-womens-rights-are-a-national-security-issue/274770>; see also HUDSON & LEIDL, *supra* note 141.

¹⁴³ Hillary Clinton, Sec’y of State, Remarks at the TEDWomen Conference (Dec. 8, 2010), <http://m.state.gov/md152671.htm>; see Micah Zenko, *Book Review – “The Hillary Doctrine: Sex & American Foreign Policy,”* COUNCIL ON FOREIGN REL. (June 24, 2015), <http://blogs.cfr.org/zenko/2015/06/24/book-review-the-hillary-doctrine-sex-american-foreign-policy> (noting that the “Hillary Doctrine” stems from Clinton’s TEDWomen Conference remarks and explaining that, “[i]n countries where women are chronically mistreated, or systematically excluded from leadership roles, there tends to be far greater state fragility, outbreaks and reoccurrences of conflict, and environments where extremists can flourish, including even terrorist organizations”).

¹⁴⁴ *Leading Through Civilian Power: The First Quadrennial Diplomacy and Development Review*, U.S. DEP’T STATE 23 (2010), <http://www.state.gov/documents/organization/153108.pdf>.

¹⁴⁵ *U.S. Dep’t of State Policy Guidance: Promoting Gender Equality to Achieve Our National Security and Foreign Policy Objectives*, U.S. DEP’T STATE 1 (Mar. 2012), <http://www.state.gov/documents/organization/189379.pdf> (summarizing internal Department policy guidance in a fact sheet).

¹⁴⁶ *Id.* Clinton further notes:

Evidence shows that investments in women’s employment, health, and education are correlated with greater economic growth and more successful development outcomes. Engaging women as political and social actors can change policy choices and makes institutions more representative and better performing.

Id.

Paradoxically, Hillary Clinton has been a long-time proponent of the antisubordination approach. For example, in her watershed 1995 speech in Beijing at the United Nations' Fourth World Conference on Women, Clinton pronounced that "human rights are women's rights . . . and women's rights are human rights."¹⁴⁷ But by the fifteenth anniversary of the Beijing Conference, in a UN Security Council session on WPS that Secretary of State Clinton herself chaired in 2010 (for the tenth anniversary of UNSCR 1325), she declared:

Now, women's participation . . . is not [merely] a "nice thing to do." . . . This is a necessary global security imperative. Including women in the work of peace advances our national security interests, promotes political stability, economic growth, and respect for human rights and fundamental freedoms.¹⁴⁸

Perhaps more than any other opinion maker, Hillary Clinton helped shift the debate over WPS from an antisubordination framework to a securitization one.

B. The Securitization Account

1. The Rationale

Following in the vein popularized by Hillary Clinton, the securitization account supports women's participation in peace negotiations based on the claim that it enhances the prospects for peace and deeper security.¹⁴⁹ Multilateral organizations, governments, and NGOs alike primarily rely on this rationale. For example, the most recent UN Security Council resolution on WPS, Resolution 2242, celebrates "the substantial link between women's meaningful involvement in efforts to prevent, resolve and rebuild from conflict and those efforts' effectiveness and long-term sustainability"¹⁵⁰ In implementing the initial resolution, Resolution 1325, the Obama Administration adopted a National Action Plan (NAP) on Women, Peace, and Security, which asserts that its goal of empowering "half the world's population as equal partners in preventing conflict and building peace in countries threatened and affected by war, violence, and insecurity . . . is critical to our national and global security."¹⁵¹ The United States' NAP squarely makes the

¹⁴⁷ Hillary Rodham Clinton, First Lady of the United States, Remarks for the United Nations Fourth World Conference on Women (Sept. 5, 1995), <http://www.un.org/esa/gopher-data/conf/fwcw/conf/gov/950905175653.txt>.

¹⁴⁸ Hillary Rodham Clinton, Sec'y of State, Remarks at the 10th Anniversary of UN Security Council Resolution 1325 on Women, Peace and Security (Oct. 26, 2010), <http://usun.state.gov/remarks/4843> (quoting President Obama's National Security Strategy, noting its recognition that "countries are more peaceful and prosperous when women are accorded full and equal rights and opportunity. When those rights and opportunities are denied, countries lag behind").

¹⁴⁹ See generally CHANG ET AL., *supra* note 116.

¹⁵⁰ S.C. Res. 2242, preamble ¶ 7 (Oct. 15, 2005).

¹⁵¹ UNITED STATES NATIONAL ACTION PLAN ON WOMEN, PEACE, AND SECURITY 1 (Dec. 2011), https://www.whitehouse.gov/sites/default/files/email-files/US_National_Action_Plan_on_Women_Peace_and_Security.pdf.

instrumentalist claim: “Deadly conflicts can be more effectively avoided, and peace can be best forged and sustained, when women become equal partners in all aspects of peace-building and conflict prevention, when their lives are protected, their experiences considered, and their voices heard.”¹⁵²

Leading NGO advocates and think tanks have advanced this consequentialist rationale as well. As one of the early WPS advocates, Ambassador Swanee Hunt, says: “Around the globe, women play a vital but often unrecognised role in averting violence and resolving conflict.”¹⁵³ Another prominent women’s rights advocate, Ambassador Melanne Verveer, the Director of the Georgetown Institute for Women, Peace and Security, makes a similar claim. Having served as the Ambassador-at-Large for Global Women’s Issues under Secretary of State Hillary Clinton, Verveer asserts: “Research shows that more inclusive peace processes lead to longer-term peace.”¹⁵⁴

At an even broader level, the securitization account’s claim is that women’s empowerment leads to greater prosperity and in turn greater peace and less conflict, violence, and extremism.¹⁵⁵ Investments in sex equality are said to foster economic growth and reduce poverty, thereby addressing root causes of conflict, violence and extremism. Not only do women pay increased earnings forward into their families and communities, but empowering women also has a multiplier effect because better-educated women who earn more have fewer, healthier, and better-educated children.¹⁵⁶ These children, in turn, have greater opportunities and are therefore less likely to turn to violence and extremism, and more likely to support more moderate societies.¹⁵⁷

¹⁵² *Id.*

¹⁵³ Swanee Hunt, *Moving Beyond Silence: Women Waging Peace*, in LISTENING TO THE SILENCES: WOMEN AND WAR 251, 251 (Helen Durham & Tracey Gurd eds., 2005) (“With expertise in grassroots activism, political leadership, investigative journalism, human rights law, military reform, formal and information negotiations, transitional justice and post-conflict reconstruction, these women bring new approaches to the security sphere process.”).

¹⁵⁴ Melanne Verveer, *Where Women Are Leading the Peace*, FOREIGN POL’Y (Sept. 30, 2015), <http://foreignpolicy.com/2015/09/30/where-women-are-leading-the-peace-security>.

¹⁵⁵ See, e.g., Hunt, *supra* note 153, at 251; Allison Peters, *Countering Terrorism and Violent Extremism in Pakistan: Why Policewomen Must Have a Role*, INST. FOR INCLUSIVE SEC. 2 (Mar. 31, 2014), <https://www.inclusivesecurity.org/wp-content/uploads/2014/03/IIS-Pakistan-Memo-v5c-web.pdf> (“Policewomen improve the operational effectiveness of these forces by building trust with local communities, more effectively de-escalating violence, and collecting vital intelligence that men could not.”).

¹⁵⁶ For a discussion many of the broad trends cited here, see, for example, WORLD DEVELOPMENT REPORT, *supra* note 45, at 11. For a somewhat skeptical take on the way the data is formulated and used, see Powell, *Gender Indicators as Global Governance*, *supra* note 6.

¹⁵⁷ See, e.g., Phumzile Mlambo-Ngcuka & Radhika Coomaraswamy, Women are the Best Weapon in the War Against Terrorism, Foreign Policy, Feb. 10, 2015, <http://foreignpolicy.com/2015/02/10/women-are-the-best-weapon-in-the-war-against-terrorism/>. The current spike in unemployed young people is particularly prevalent in parts of the world that experience conflict and extremism.

In the context of peace negotiations specifically, Ambassador Swanee Hunt argues that women are more connected to “community priorities,”¹⁵⁸ which prompts them to bring different experiences to the peace table. Where women have a grounding in community networks and organizations, women in peace negotiations are more likely than men to raise issues pertaining to human security, such as human rights, justice, health, and employment. These issues are important to long-term stability, and addressing them bridges differences across sectarian and cultural divides.¹⁵⁹ Moreover, one recent report that drew on more than 100 in-country interviews found that women were able to leverage their interpersonal and professional skills as well as their personal connections to advance stability and peace.¹⁶⁰ Is it possible that the ongoing marginalization that women face in the formal labor market actually empowers them as community leaders? Ambassador Hunt notes: “Ironically, women’s status as second-class citizens is a source of empowerment, since it has made women adept at finding innovative ways to cope with problems.”¹⁶¹ She also points to social science research indicating that women are more collaborative than men, and that such collaboration leads to conflict resolution.¹⁶²

2. Critiques

a) *Methodological Challenges*

There are several methodological problems with the empirical research that underlies the securitization account of WPS. First, the data linking women’s participation to more durable peace agreements does not necessarily show causation, only correlation. Furthermore, there are likely endogeneity problems. For example, as the quantitative study discussed in Part I.C.1. itself conceded, other significant factors, such as the presence of democracy, are often hard to parse out from women’s participation. Democratic countries may be likely to have women negotiate peace agreements and may produce more stable peace agreements independent of women’s

¹⁵⁸ Hunt, *supra* note 20.

¹⁵⁹ INT’L CRISIS GROUP, BEYOND VICTIMHOOD: WOMEN’S PEACEBUILDING IN SUDAN, CONGO AND UGANDA (June 28, 2006), <https://d2071andvip0wj.cloudfront.net/112-beyond-victimhood-women-s-peacebuilding-in-sudan-congo-and-uganda.pdf>.

¹⁶⁰ CHANG ET AL., *supra* note 116, at 11.

¹⁶¹ Hunt & Posa, *supra* note 19, at 41.

¹⁶² See, e.g., *id.*; see generally LANI GUINIER, TYRANNY OF THE MERITOCRACY: DEMOCRATIZING HIGHER EDUCATION IN AMERICA (2015) (applying Bear and Woolley in advancing a claim about the benefits of women and collaboration); see also Julia B. Bear & Anita Williams Woolley, *The Role of Gender in Team Collaboration and Performance*, 36 INTERDISC. SCI. REVS. 146 (2011) (demonstrating through social science research that women are more collaborative).

These types of arguments supporting women’s participation echo those made in support of diversity on corporate boards. For example, Darren Rosenblum and Daria Roithmayr note that because women are “more likely to be outsiders” on corporate boards, adding women draws on a wider range of expertise, which benefits corporate decision making. Rosenblum et al., *supra* note 53, at 889.

participation. Moreover, the least stable agreements are likely to be the ones worked out by parties that have recently been at war, and those are the ones most likely to involve military negotiators. So, recent hot warfare leads to negotiations dominated by prior male combatants rather than civilian women; combatants' presence may independently lead to a higher likelihood of renewed warfare—a fact that correlates with gender, but does not necessarily prove that underrepresentation of women is responsible for a peace agreement being less durable.

A final methodological problem is that gaining access to data in conflict situations—and accessing gender-disaggregated data in many parts of the world—can be quite challenging. Women and girls are often under-counted in data-gathering exercises, and male-biased surveys often fail to capture women's participation, perspectives, and value.¹⁶³ When the data pool is small, it is difficult to draw reliable conclusions from quantitative analysis.

b) *The Anti-Essentialist Challenge: Women Are Not Always Doves*

Beyond the methodological challenges in the empirical research, the assumption that women bring different values or experiences to the peace table—while perhaps often true—is overly essentialist¹⁶⁴ and not universally accurate. Not all women are “peace-loving,” and several women leaders have been hawkish on military matters. Margaret Thatcher and Golda Meir were strong, hawkish women leaders. As a senator, Hillary Clinton voted to support George W. Bush's decision to invade Iraq in 2003 and, as Secretary of State, she (along with Susan Rice and Samantha Power) supported U.S. intervention in Libya in opposition to Defense Secretary Robert Gates and other members of the military establishment.¹⁶⁵

In a sense, it is hard to gauge how hawkish or dove-ish individual women are based only on their support for or opposition to military intervention. For instance, because Hillary Clinton had her eye on higher office and was undoubtedly aware that women are perceived as “weak,” she may have overplayed the hawk card in her Iraq vote to demonstrate her “toughness” as a potential future president. In Israel, too, women politicians sometimes overcompensate with hawkish stances to counteract social perceptions of women as peace-loving.¹⁶⁶ On the other

¹⁶³ Bill & Melinda Gates Foundation, *Closing the Gender Data Gap: How Efforts to Collect Data About Women and Girls Drive Global Economic and Social Progress*, N.Y. TIMES, <http://paidpost.nytimes.com/gates-foundation/closing-the-gender-data-gap.html>.

¹⁶⁴ For a groundbreaking early critique of gender essentialism, see Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

¹⁶⁵ See, e.g., John Avlon, *Libya Airstrikes: The Women Who Called for War*, DAILY BEAST (Mar. 20, 2011, 7:50 PM), <http://www.thedailybeast.com/articles/2011/03/20/libya-airstrikes-hillary-clinton-and-the-women-who-called-for-war.html>; Jacob Heilbrunn, *America's Foreign Policy Valkyries: Hillary Clinton, Samantha Power, and Susan Rice*, NAT'L INTEREST (Mar. 21, 2011), <http://nationalinterest.org/blog/jacob-heilbrunn/americas-foreign-policy-valkyries-hillary-clinton-samantha-p-5047>; see also Jo Becker & Scott Shane, *The Libya Gamble, Part I: Hillary Clinton, 'Smart Power' and a Dictator's Fall*, N.Y. TIMES (Feb. 27, 2016), <http://www.nytimes.com/2016/02/28/us/politics/hillary-clinton-libya.html>.

¹⁶⁶ See, e.g., Yael Yishai, *LAND OR PEACE: WHITHER ISRAEL?* 179-181 (1987) (explaining how Israeli women overcompensate for their lower societal status and perceived femininity by taking stronger stances on security than Israeli men); Yael Yishai, *BETWEEN THE FLAG AND THE BANNER: WOMEN IN ISRAELI POLITICS* 107-109 (2012). I would like to thank my colleague Jed Shugarman for flagging this phenomenon.

hand, since the women who are most likely to rise to the top in political and military institutions are women who can succeed in a “man’s world,” it should not surprise if these women really are more hawkish. Thus, the problem with the securitization framework is that while it calls for women’s leadership—and anticipates that women will promote peace—it is not clear that the women who will step forward (or be selected) to lead will “perform” gender in the ways the securitization account anticipates.

Additional evidence that women have the potential to orient toward militarism as they gain equality with men includes: the Supreme Court’s recognition that women should not be excluded from historically all-male military academies,¹⁶⁷ the Obama Administration’s decision to drop the combat ban on women serving in the U.S. military,¹⁶⁸ and the inclusion of women in the Special Forces.¹⁶⁹

A further indication that not all women are peaceniks is the militarization of feminism, reflected in, for example, the calls by prominent feminist Eleanor Smeal for an ongoing U.S. military presence in Afghanistan to support the women’s rights.¹⁷⁰ Furthermore, women have

¹⁶⁷ United States v. Virginia, 518 U.S. 515 (1996).

¹⁶⁸ See, e.g., P.J. Tobia, *Defense Secretary Carter Opens All Combat Jobs to Women*, PBS NEWSHOUR (Dec. 3, 2015, 11:41 PM), <http://www.pbs.org/newshour/rundown/watch-live-defense-secretary-carter-to-lift-ban-on-women-in-combat-jobs>.

¹⁶⁹ See generally GAYLE TZEMMACH LEMMON, *ASHLEY’S WAR* (2015).

¹⁷⁰ See, e.g., Catherine Powell, Gail Tzemach Lemmon & Hannah Chartoff, *Safe Enough to Thrive*, MS. MAGAZINE (May 12, 2015), <http://msmagazine.com/blog/2015/05/12/afghanistans-women-safe-enough-to-thrive> (quoting Eleanor Smeal’s support for an ongoing military presence in Afghanistan); see also Karen Engle, “*Calling in the Troops*”: *The Uneasy Relationship Among Women’s Rights, Human Rights, and Humanitarian Intervention*, 20 HARV. HUM. RTS. L. J. 189 (2007) (urging reconsideration of humanitarian intervention as an emerging norm where women’s rights are concerned, and using as examples debates over rape constituting acts of genocide in Bosnia and Herzegovina and Darfur, Sudan); Catherine Powell, *Mr. Ghani Goes to Washington*, COUNCIL ON FOREIGN REL.: WOMEN AROUND THE WORLD (Mar. 21, 2015), <http://blogs.cfr.org/women-around-the-world/2015/03/27/mr-ghani-goes-to-washington> (responding to President Obama’s announcement that he would delay the drawdown of U.S. troops in Afghanistan, and cautioning against the trend toward militarizing women’s human rights, when diplomacy and soft power may be more effective and sustainable, less costly, and more protective of American and Afghan lives).

even joined or supported terrorist groups, including the Islamic State,¹⁷¹ though it is not clear to what extent these women have been coerced or are exercising false consciousness, as opposed to demonstrating their true agency.¹⁷²

c) Instrumentalizing Feminism Has Limitations and Risks

As I have explored elsewhere,¹⁷³ while instrumentalizing and mainstreaming feminism helps instantiate it in the “halls of power,”¹⁷⁴ such “Governance Feminism”¹⁷⁵ risks deradicalizing its liberatory potential. As Janet Halley and her co-authors warn, “[m]erging [feminism] into the mainstream can . . . consolidate a particularistic, identity-based project, sometimes at the expense of alternative affiliations that ignore the siren call of victimization and identity . . . [and] [s]ome of the best things within and about feminism get left out.”¹⁷⁶ At its best,

¹⁷¹ Katrin Bennhold, *For Woman Dead in French Police Raid, Unlikely Path to Terror*, N.Y. TIMES (Nov. 20, 2015), <http://www.nytimes.com/2015/11/21/world/europe/hasna-aitboulahcen-paris-attacks.html>; Katrin Bennhold, *Jihad and Girl Power: How ISIS Lured 3 London Girls*, N.Y. TIMES (Aug. 17, 2015), <http://www.nytimes.com/2015/08/18/world/europe/jihad-and-girl-power-how-isis-lured-3-london-teenagers.html>; Kimiko De Freytas-Tamura, *Teenage Girl Leaves for ISIS, and Others Follow*, N.Y. TIMES (Feb. 24, 2015), <http://www.nytimes.com/2015/02/25/world/from-studio-city-teenager-to-isis-recruiter.html>; Suzanne Daley & Maia de la Baume, *A French Town Reels After Teenage Girl Vanishes, Apparently to Join Jihadists*, N.Y. TIMES (Dec. 1, 2014), <http://www.nytimes.com/2014/12/02/world/europe/a-french-town-reels-after-teenage-girl-vanishes-apparently-to-join-jihadists.html>; Azadeh Moaveni, *ISIS Women and Enforcers in Syria Recount Collaboration, Anguish and Escape*, N.Y. TIMES (Nov. 21, 2015), <http://www.nytimes.com/2015/11/22/world/middleeast/isis-wives-and-enforcers-in-syria-recount-collaboration-anguish-and-escape.html>.

¹⁷² For thoughtful discussion of this topic, see, for example, Mia Bloom, *DYING TO KILL: THE ALLURE OF SUICIDE TERROR* (2005); Mia Bloom, *BOMBSHELL: WOMEN AND TERRORISM* (2011); Fionnuala Ní Aoláin, *Situating Women in Counterterrorism Discourses - Undulating Masculinities and Luminal Femininities*, 93 B.U. L. REV. 1085 (2013); Natalya Wallin, *Power of Persuasion: A New Approach to Understanding Female Suicide Terrorism*, COUNCIL ON FOREIGN REL.: WOMEN AROUND THE WORLD (Aug. 17, 2015), <http://blogs.cfr.org/women-around-the-world/2015/08/17/power-of-persuasion-a-new-approach-to-understanding-female-suicide-terrorism>. See also Catherine Powell, *Can the Chibok Girls Be Held Accountable for Boko Haram's Atrocities?*, COUNCIL ON FOREIGN REL.: WOMEN AROUND THE WORLD (July 16, 2015), <http://blogs.cfr.org/development-channel/2015/07/16/can-the-chibok-girls-be-held-accountable-for-boko-harams-atrocities>. Cf. Stephanie McCurry, *Enemy Women and the Laws of War in the American Civil War* 1 (Aug. 10, 2016) (draft on file with author) (discussing how the Lieber Code fundamentally rewrote the distinction between combatants and civilians, “eviscerating [] the assumption of women’s innocence on which the identity of the civilian was (and is) premised.”).

¹⁷³ See Powell, *Gender Indicators in Global Governance*, *supra* note 6.

¹⁷⁴ JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* 21 (2006).

¹⁷⁵ Janet Halley, Prabha Kotiswaran, Hila Shamir & Chantal Thomas, *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J.L. & GENDER 335 (2006).

¹⁷⁵ Janet Halley, Prabha Kotiswaran, Hila Shamir & Chantal Thomas, *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J.L. & GENDER 335 (2006).

¹⁷⁶ Janet Halley, *Describing and Assessing Governance Feminism*, in *GOVERNANCE FEMINISM: AN INTRODUCTION* 4 (Janet Halley, Prabha Kotiswaran, Rachel Rebouché & Hila Shamir eds.) (forthcoming 2016) (noting another cost of

Governance Feminism has helped justify greater funding for women's issues by national governments and international institutions.¹⁷⁷ At its worst, Governance Feminism can obscure parts of the feminist agenda that do not serve the goals of the broader agenda,¹⁷⁸ justify strategies that undercut other feminist goals,¹⁷⁹ and pave the way for other problematic policies and politics.¹⁸⁰ Thus, the UN-commissioned global study on the implementation of Resolution 1325 warns that "the agenda of 1325 should not be 'securitized' and women should never be used as instruments in any military strategy."¹⁸¹ In sum, critics of the securitization approach argue that claims that women's participation leads to more sustainable peace are exaggerated, inaccurate, and/or dangerous.

III. A New Theoretical Frame: The Democratic Legitimacy Account

Moving beyond the prevailing debate between the antisubordination and securitization accounts, the democratic legitimacy account illustrates that increasing women's participation in peacemaking creates a more representative, universal, democratic, and fair process with greater buy-in from all, either because the process actually *is* more legitimate (normative legitimacy) or because it is *perceived* as more legitimate (sociological legitimacy). This Part identifies and theorizes a democratic legitimacy framework for WPS—an account eclipsed in the current debate. In light of the vulnerabilities inherent in both the antisubordination and securitization accounts of women's participation, this Part proposes democratic legitimacy as an alternative justification that uncovers important values of women's participation that the other two approaches miss.

A. The Rationale

Governance Feminism: "Women benefit differentially; some are harmed; and conflicts among feminists about what worlds to imagine are prematurely settled.").

¹⁷⁷ See Powell, *Gender Indicators in Global Governance*, *supra* note 6.

¹⁷⁸ *Id.*

¹⁷⁹ Coomaraswamy et al., *supra* note 15, at 384 (noting that while some counter-terrorism measures are justified to defend against the subjugation of women by extremists, such measures have occasionally had a chilling effect on fundraising efforts of particular women's organizations, given limits on funding for organizations with even perceived or attenuated associations with presumed terrorists).

¹⁸⁰ See, e.g., Powell et al., *supra* note 170. This piece notes that while extending the U.S. military presence in Afghanistan could help bolster the capacity of the Afghan security sector to protect Afghan women and girls, the decision to delay the draw-down of U.S. troops also justified the use of drones in the region, which has led to civilian deaths and arguably intensified anti-American sentiment in the region. See Micah Zenko, *What Happens if Afghanistan Shuts Down the U.S. Drone Program There?*, ATLANTIC (Apr. 9, 2012), <http://www.theatlantic.com/international/archive/2012/04/what-happens-if-afghanistan-shuts-down-the-us-drone-program-there/255602>.

¹⁸¹ Coomaraswamy et al., *supra* note 15, at 14.

While overlapping with particular aspects of the other two WPS accounts, democratic legitimacy also addresses distinct concerns that the two other approaches fail to capture. Democratic legitimacy is different from the antistatist approach because, rather than focus on opportunities for individual women (or even women as a group), the former focuses on the integrity of the broader process or institutions in question, which cannot claim to be legitimate if half of humanity is not represented.¹⁸² Democratic legitimacy is also different from the securitization account. While a more legitimate peace process that is more representative and inclusive will likely secure broader buy-in and therefore be more sustainable, the value of legitimacy sweeps much broader than the securitization approach by addressing fairness and democracy concerns as well as the durability of peace.

The impact of women's representation in the development of peace agreements (and in transitioning societies from conflict to peace) can be understood as strengthening the democratic legitimacy of not only the peace processes themselves but also the transitions and governance structures that flow from them. Legitimacy itself can be conceptualized in at least three ways: normative legitimacy, sociological legitimacy, and democratic legitimacy.¹⁸³ This Part explains how women's participation is important for both normative and sociological legitimacy. It then turns to the significance of women's participation for democratic legitimacy and develops a theory that incorporates elements of the other two to help further conceptualize democratic legitimacy as a stronger basis for WPS than either the antistatist or securitization approach.

1. Normative Legitimacy

First, the underrepresentation of women in peace processes endangers the normative legitimacy of these processes because women and men approach peace processes differently based on their dissimilar roles in and experiences of war. As discussed in Part I.C., research suggests that women frequently bring different experiences and perspectives to the peace table and are therefore more likely to raise matters concerning human rights, justice, health, and employment.

While there is limited research on gender and peace processes, scholarship on U.S. courts reflects that, whereas the gender of a judge typically has a minimal and sometimes absent effect on judicial outcomes, in cases raising gender concerns (e.g., sex discrimination cases and family law matters) the gender of the judge *is* correlated with different decision-making outcomes.¹⁸⁴ In

¹⁸² Julie C. Suk, Quotas: From Discrimination to Democratic Legitimacy 9, Guest Lecture in Comparative Civil Rights Course, Stanford Law School (May 22, 2012) (draft on file with author).

¹⁸³ This approach borrows from and adapts Nienke Grossman's work on gender and international courts. Cf. Grossman, *Sex on the Bench*, *supra* note 53 (discussing these forms of legitimacy in the context of the representation of women judges sitting on international courts).

¹⁸⁴ Sally J. Kenney, *Thinking About Gender and Judging*, 15 INT'L J. LEGAL PROF. 87, 96-101 (2008). Nienke Grossman notes, "Especially since United States President Jimmy Carter made concerted efforts to diversify the United States federal bench, many scholars have studied the impact of gender (and race) on judging in the United

the context of sex discrimination cases, one study of U.S. federal appellate cases demonstrated that when a judge was male, a plaintiff was ten percentage points less likely to win.¹⁸⁵ But male judges were more likely to rule for the plaintiff when a woman judge was on the same panel deciding the case.¹⁸⁶ In fact, the survey concluded that “the presence of a female on a panel actually *causes* male judges to vote in a way they otherwise would not—in favor of plaintiffs.”¹⁸⁷

There is limited data on whether gender representation on international courts similarly affects outcomes, but prominent female judges who have served on international courts indicate that it does, at least in cases involving rape and other crimes of sexual violence. For example, former International Court of the Tribunal of the Former Yugoslavia Judge Patricia Wald said: “A judge is the sum of her experiences and if she has suffered disadvantages or discrimination as a woman, she is apt to be sensitive to its subtle expressions or to paternalism.”¹⁸⁸ She notes several important precedents involving gender crimes in cases in which at least one of the judges was a woman.¹⁸⁹ While more skeptical about whether the gender of the judge makes a difference, former International Criminal Court (ICC) Judge Navanethem Pillay acknowledges that “women come with a particular sensitivity and understanding about what happens to people who are raped.”¹⁹⁰

The different experiences and priorities women bring to the peace table are largely attributable to the ways their views are informed by the different social roles women play. Thus, to say that women may bring different views to the peace table – which may (or may not) result in different outcomes – is not to say that women are biologically or inherently different from men. Nor does it insist that women will reach different substantive outcomes

States.” Grossman, *Sex on the Bench*, *supra* note 53. See Theresa M. Beiner, *What Will Diversity on the Bench Mean for Justice?*, 6 MICH. J. GENDER & L. 113, 117-20 (1999).

¹⁸⁵ Christina L. Boyd, Lee Epstein & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389, 390 (2010).

¹⁸⁶ *Id.* at 390, 406.

¹⁸⁷ *Id.* at 406; see also KARPOWITZ & MENDELBERG, *supra* note 12, at 239-272 (discussing how and when women’s participation shapes the group’s generosity).

¹⁸⁸ Wald, *supra* note 51, at 989. Judge Wald previously served on the United States Court of Appeals in Washington, D.C. *Id.*

¹⁸⁹ Patricia M. Wald, *What Do Women Want from International Criminal Justice? To Help Shape the Law*, INTLAWGRRLS (Oct 5, 2009), <http://intlwgrrls.blogspot.com/2009/10/what-do-women-want-from-international.html>.

¹⁹⁰ DANIEL TERRIS, CESARE P.R. ROMANO & LEIGH SWIGART, THE INTERNATIONAL JUDGE: AN INTRODUCTION TO THE MEN AND WOMEN WHO DECIDE THE WORLD’S CASES 48 (2007) (noting, however, that Judge Pillay has more generally contended that she does not think women judges “decide in a different way”). In addition to serving as a judge on the ICC, Judge Pillay was also the first non-white woman judge on the High Court of South Africa and served as President of the International Criminal Tribunal for Rwanda. *FACTBOX – South Africa’s Pillay is New Human Rights Chief*, REUTERS (July 28, 2008), <http://uk.reuters.com/article/idUKL843084620080728>.

per se. This perspective does not rely on essentialism in the way the securitization approach frequently does, as it turns more on the fact that women typically bring different perspectives because they often have different social roles than men, and therefore women's participation in decision making—whatever outcome is reached—bolsters the *representativeness* of the process.

2. Sociological Legitimacy

Second, even where individual women bring perspectives to the peace table that are not remarkably different than men nor more likely to lead to different substantive outcomes, the underrepresentation of women in a particular peace process undermines the sociological legitimacy for constituencies that nonetheless believe women negotiators will approach peace negotiations differently and represent the interests of women more fairly.¹⁹¹ For groups such as women, who have been traditionally excluded, discriminated against, and unfairly treated, inclusion in peace processes strengthens the sociological legitimacy of these processes. Exclusion perpetuates a *perception* of bias, which can undercut the legitimacy of a peace process when members of excluded groups view it as unrepresentative.¹⁹² For these reasons, women's groups have lobbied aggressively for women to be appointed to international war crimes tribunals, even in the absence of firm evidence or guarantees that women judges would be more responsive to women's concerns.¹⁹³ For similar reasons, other constituencies have pushed for racial, national, and other types of balance on domestic and international courts.¹⁹⁴

3. Democratic Legitimacy

Finally, gender composition is important for the democratic legitimacy of peace processes because representation is an important element of democratic institutions.¹⁹⁵ As

¹⁹¹ Cf. Grossman, *Sex on the Bench*, *supra* note 53, at 661.

¹⁹² *Id.*

¹⁹³ *Id.* at 664 (noting, *inter alia*, the advocacy efforts of the Women's Caucus for Gender Justice, which argued for gender balance and expertise on sexual violence in the staffing and operations of the International Criminal Court, on the grounds that failure to do so "might harm 'perceptions' of States, their overall attitude towards the Court, and in the long run, the Court's efficacy and credibility." (quoting Medard R. Rwelamira, *Composition and Administration of the Court*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS 357, 359 (Roy S. K. Lee ed., 1999))).

¹⁹⁴ See, e.g., Grossman, *Sex on the Bench*, *supra* note 53, at 665 (noting Nelson Mandela's critique of the apartheid-era judiciary in South Africa, in which Mandela asked a white magistrate: "Why is it that in this courtroom I face a white magistrate, am confronted by a white prosecutor, and escorted into the dock by a white orderly? Can anyone honestly and seriously suggest that in this type of atmosphere the scales of justice are evenly balanced?" (citing NELSON MANDELA, THE STRUGGLE IS MY LIFE: HIS SPEECHES AND WRITINGS BROUGHT TOGETHER WITH HISTORICAL DOCUMENTS AND ACCOUNTS OF MANDELA IN PRISON BY FELLOW-PRISONERS 135 (1986))).

¹⁹⁵ Grossman, *Sex on the Bench*, *supra* note 53, at 668.

Nienke Grossman notes, while normative and sociological legitimacy “focus on the relationship between sex representation, impartiality, and legitimacy,” democratic legitimacy “examines the relationship between representativeness *qua* representativeness and legitimacy.”¹⁹⁶ Just as geographical diversity is important to the legitimacy of many democratic institutions, Grossman points out that “sex representation strengthens the legitimacy [of institutions] by reflecting the population subject to their authority, an important democratic value.”¹⁹⁷ While Grossman’s work focuses on gender representation on international courts, the same underlying reasoning applies to gender representation in peace negotiations.

The principle of democratic legitimacy applies beyond the formal state,¹⁹⁸ even when representatives who negotiate over peace are not technically state officials—for example, because they represent an opposition group or are selected from civil society. Because peace processes, and the structures established as a result, wield public and legal authority, gender representation is an important aspect of their democratic legitimacy. In fact, peace processes frequently establish legal, political, economic, and social arrangements for societies transitioning from conflict to peace.

Julie Suk’s work on gender quotas in Europe drives home the benefits of recasting gender representation as an issue of democratic legitimacy rather than antisubordination.¹⁹⁹ As Suk notes, in the debate over gender quotas in France, when women’s representation was framed as “equal opportunity,” “equal access,” or “affirmative action,” the push for gender quotas was not successful.²⁰⁰ Under these circumstances, the primary purpose—to enhance women’s opportunities to compete for positions of power so that their voice as a group could be heard—was viewed as a special interest and was divisive.²⁰¹ But when gender quotas were reframed more recently as “parity democracy,” gender quotas in France united, rather than divided, the republic, since the French identified with the *universal* aspiration of democracy shared by both men and women.²⁰² Rather than “enhancing women’s opportunities as individuals or even as a group,” the primary aim of gender parity “is to legitimize the exercise of political, economic, and social power.”²⁰³ Critically, as Suk notes, “the new model embraced gender *balance* as a

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 668-69.

¹⁹⁸ See Gráinne De Búrca, *Developing Democracy Beyond the State*, 46 COLUM. J. TRANSNAT’L L. 221, 226-27 (2008).

¹⁹⁹ Suk, *supra* note 182, at 9.

²⁰⁰ *Id.* at 8.

²⁰¹ *Id.* at 8-9.

²⁰² *Id.*

²⁰³ *Id.* at 9.

collective democratic goal rather than equal opportunity for a minority group.”²⁰⁴ After all, “women were ‘not a lobby’ but ‘half of the sovereign people, half of the human species’ . . . [and] “[d]emocratic governance could not claim to be universal or legitimate if half of humanity were not represented.”²⁰⁵

By valuing women as worthy of participation, democratic legitimacy embraces their role as equal citizens while going beyond antisubordination’s claim to equality for the sake of its direct beneficiaries. As the slogan popularized by disability activists but also used by feminists goes: “Nothing about us without us.”²⁰⁶ Viewed in the context of democratic legitimacy, gender representation benefits the community as a whole, because the overall process—and the decision making that flows from it—is more representative and thus better. Echoing John Hart Ely’s political process point,²⁰⁷ the argument here is that by democratizing the process, democratic inclusion of women helps to address the problems that occur when groups are systematically excluded.²⁰⁸

While WPS is a relatively young field, women’s participation as judges on international courts once again provides a useful analogy for considering the importance of gender representation for democratic legitimacy. Formal requirements for gender diversity represent a growing trend on international courts, where calls for diversity in appointments are often framed in terms of “representation” and democratic legitimacy.²⁰⁹ Along with geographic representation, the Rome Statute of the ICC requires “a fair representation of female and male judges” as well as individuals with legal expertise on violence against women and children.²¹⁰ Governments,

²⁰⁴ *Id.* (emphasis added).

²⁰⁵ *Id.* (internal citations omitted).

²⁰⁶ See, e.g., JAMES I. CHARLTON, *NOTHING ABOUT US WITHOUT US* (1998). While this expression has its roots in a Central European phrase from centuries ago, it made its way to the United States and is closely analogous to the familiar American Revolution slogan, “No taxation without representation.” See NORMAN DAVIES, *HEART OF EUROPE: THE PAST IN POLAND’S PRESENT* 261 (1984).

²⁰⁷ JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980). Ely famously made the following observation about unfairness in the political process:

Malfunction occurs when the *process* is undeserving of trust, when (1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) though, no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system.

Id. at 103.

²⁰⁸ *Id.*

²⁰⁹ Grossman, *Sex on the Bench*, *supra* note 53, at 669-70.

²¹⁰ The Rome Statute of the International Criminal Court, 37 ILM 999, 1020 (1998) (Rome Statute) art. 36(8)(a)-(b).

through their diplomatic representatives, have noted the importance of diversity on other war crimes tribunals as well. For example, Bosnia's Ambassador to the UN, Mohamed Sacirbey, criticized the fact that there were no Muslim judges on the International Criminal Tribunal for the Former Yugoslavia (ICTY), stating: "It is absurd that most of the victims are Muslim, yet they have no representatives on the Tribunal."²¹¹ As for gender diversity, U.S. State Department Legal Adviser Conrad Harper indicated that the Clinton Administration had an interest in nominating a woman as an ICTY judge "because of the use of rape as an instrument of warfare in the Bosnian conflict."²¹² Similar arguments were raised with regard to the International Criminal Tribunal on Rwanda (ICTR).²¹³ After the International Criminal Court Statute was signed, the UN Security Council amended the statutes for the ICTY and ICTR to add ad litem judges and stated that, in nominating candidates, states should take "into account the importance of a fair representation of female and male candidates."²¹⁴

While courts are different from peace negotiations, the argument for democratic representation can be applied with equal, if not greater, force in the latter context. Peace agreements can lead to broad institutional, legal, political, and economic changes affecting the whole society, whereas courts are typically more insulated from democratic accountability, and court decisions are frequently limited to the facts or circumstances of a particular case. The fact that women comprise roughly half the world's population lends further support to the assertion that female representation is an important aspect of the democratic legitimacy of peace processes.

4. Democratic Legitimacy: Both Normative and Sociological

²¹¹ IAIN GUEST, ON TRIAL: THE UNITED NATIONS, WAR CRIMES AND THE FORMER YUGOSLAVIA 131 (1995).

²¹² MICHAEL P. SCHARF, BALKAN JUSTICE: THE STORY BEHIND THE FIRST INTERNATIONAL WAR CRIMES TRIAL SINCE NUREMBERG 66 (1997).

²¹³ Grossman, *Sex on the Bench*, *supra* note 53, at 671 (noting that in lamenting the underrepresentation of women judges on the Rwanda Tribunal, Judge Wald made the broader observation that, "[i]n general, women had been woefully underrepresented on all international tribunals" (quoting Wald, *supra* note 51, at 991)).

²¹⁴ *Id.* (citing Security Council Res No 1329, UN Doc S/RES/1329 (2000), Annex I, Art 13; Security Council Res No 1431, UN Doc S/RES/1431 (2002), Annex I, Art 12). Grossman notes, however, "Neither statute was amended to include female and male permanent judges." *Id.* at 671 n.131.

Outside the field of international criminal law, there has been a move to include representatives from blocks of countries that lack power. The WTO's Dispute Settlement Understanding permits developing countries that are parties to a dispute against a developed country to request a panel member from a developing state—the emphasis being not on general geographic diversity, but rather on the inclusion of an adjudicator from a developing country. *Id.* at 665-66. Importantly, Grossman points out: "It is not surprising that developing countries demanded developing-country judges, given Third World critiques of international law and institutions." *Id.* at 666 (citing Antony Anghie and B.S. Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflicts*, 2 CHINESE J. INT'L L. 77 (2003); and Makau Mutua & Antony Anghie, *What is TWAIL?*, 94 AM. SOC. INTL. L. PROC. 31 (2000)).

Taken together, these three approaches to legitimacy affirm the importance of representation to advance fairness (whether in reality or only in popular perception) and democratic values. In fact, a theory of democratic legitimacy that incorporates normative and sociological legitimacy clarifies how democratic legitimation provides a sounder basis for WPS than either the antisubordination or securitization account.

First, an account of democratic legitimacy is partially normative, because “representation is an important democratic value.”²¹⁵ Moreover, women’s participation can contribute to a process that is not only procedurally more representative, but substantively more representative in terms of the different experiences and priorities women bring to the peace table—regardless of whether or not the substantive outcome is different (i.e., more peace-oriented, as the securitization approach assumes). As is the case with courts—where evidence shows that women judges are more likely to make different decisions than their male counterparts in cases involving sex discrimination or family law²¹⁶—evidence also shows that women bring different experiences and priorities to the peace table on matters such as human rights, justice, health, and employment issues. This account avoids essentialism, because evidence demonstrates that the different perspectives women bring to the peace table are based on the different *social* roles women play, as opposed to biological or other inherent differences. Nor does a democratic legitimation account insist that women will reach different substantive *outcomes* per se; rather, they will bolster the *representativeness* of the process and the perspectives—the substantive *inputs*—that shape the process.

Second, an account of democratic legitimacy is partially sociological, because women’s participation can contribute to a process that is *perceived* as more substantively representative in terms of the outcome of the decision making—again, regardless of the peace-orientation of the outcome. As discussed in Part III.A.2., even where individual women bring perspectives to the peace table that are not notably different than men’s nor more likely to lead to different substantive outcomes, the representation of women enhances the sociological legitimacy of the process for constituencies that believe women negotiators will approach peace negotiations differently and represent the interests of women in these negotiations more sufficiently. For historically excluded groups, such as women, inclusion in peace processes strengthens the sociological legitimacy of the process and therefore its democratic pedigree. Exclusion, on the other hand, perpetrates a *perception* of bias, which can undermine the legitimacy of a peace process, where the process is not viewed as representative.

By incorporating normative and sociological elements, democratic legitimacy provides a nuanced justification for WPS not only because women’s participation enhances representativeness as a matter of process, but also because it strengthens representativeness in terms of substantive inputs, regardless of substantive outcomes. By providing a third way of rationalizing women’s participation beyond antisubordination and securitization accounts,

²¹⁵ Grossman, *Sex on the Bench*, supra note 53, at 674.

²¹⁶ See supra Section III.A.1.

democratic legitimacy offers an alternative justification of WPS. In contrast to the antisubordination framework, which emphasizes equal access for women as individuals (or as a group)—and which critiques disparage as “preferential treatment” or catering to “special interests”²¹⁷—legitimacy offers an account of the representativeness of the process by which decision making and power are allocated. In contrast to the securitization narrative, which rests on essentialist assumptions about women and an as-yet incomplete empirical record, democratic legitimacy addresses the fairness of excluding half of humanity in processes whose outcomes will be imposed on all.

In its quest for fairness and meaningful equality, democratic legitimacy overlaps with aspects of the antisubordination account. As with the antisubordination framework, the idea of democratic legitimation is aimed at opening up opportunities for individuals and groups. But the democratic legitimacy approach goes further by insisting on deep inclusion of those previously excluded as a way of strengthening the process for *everyone*. Importantly, as with antisubordination, democratic legitimation is grounded in a model of inclusion that can apply to subordinated groups beyond women, as well as to inequality at the intersection of vectors of inequality.²¹⁸ Kimberle Crenshaw originally developed the legal theory of “intersectionality” in the context of antisubordination theory. But Crenshaw’s powerful insight—that law masks the intersection of antisubordination and must be reoriented to address intersectional inequality—can also be applied in the context of democratic legitimacy, given its applicability to vectors of inequality beyond gender, such as race and ethnicity. Applying intersectionality from a democratic legitimacy standpoint, individuals who live their lives at the intersection of gender and other vectors of inequality must be included in democratic institutions and processes—such as peace-making processes—because their participation enhances the democratic pedigree of the process and thereby strengthens its legitimacy and prospects for peace for *all*. Moreover, by emphasizing democratic representation, democratic legitimation depends on local ownership and bottom-up solutions, emphasizing participation and leadership of women in war zones rather than female global elites. Democracy’s insistence on representation and accountability favors devolution to local law-making and therefore greater inclusion and diversity along all demographic axes, in contrast to merely empowering the few global elites and cosmopolitans who rise to the top precisely because they can operate on terms set by other elites.

A democratic legitimation approach also shares common ground with elements of the securitization account. For example, because the very fact of women’s participation creates a more representative process (or at least a perception of one), it secures broader public support and is therefore more sustainable. But the idea motivating legitimacy is the *representativeness* of the process, regardless of whether a more inclusive process leads to more durable, secure outcomes.

B. Potential Critiques

²¹⁷ For persuasive rebuttals to these critics, see *supra* note 17.

²¹⁸ See Crenshaw, *supra* note 18.

I anticipate at least three potential criticisms of the legitimacy account, which I outline and respond to in this Section.

1. The Challenge of Balkanization

One critique is that creating a democratically legitimate peace process may require the use of gender quotas as one potential mechanism for improving representation. Some fear quotas could balkanize the process. Even though the reasoning underlying legitimacy is distinct from the antisubordination rationale, as a practical matter, gender quotas can be used to advance the goals underlying either account to advance women's participation in peace processes. As discussed above, in France²¹⁹ the use of gender quotas to advance the interest of individual women (or women as a group), per the antisubordination approach, led to division and balkanization.²²⁰ However, when gender quotas were reframed as promoting representative forms of governance, "gender balance" received wider support and was viewed as promoting democracy, social cohesion, and antibalkanization.²²¹

2. The Challenge of Procedural Minimalism

A second potential criticism is that democratic legitimacy is a weak, thin account of women's participation in peace and security because it merely advances minimalist proceduralism rather than robust substantive change. However, the fact that the democratic legitimacy rationale is procedural, universalist, and neutral (at least on the surface) is *precisely* its appeal and efficacy, from both conceptual and practical perspectives. The democratic legitimacy approach ushers in transformative, *structural* change that can, in fact, undo the deep-seated substantive inequality that antisubordination proponents seek, while also addressing the need for deeper buy-in to agreements that securitization adherents desire. As a practical matter, cloaking women's participation in the frame of democratic legitimacy is akin to using a Trojan horse. Increasing participation by women not only bolsters the democratic pedigree of the peacemaking process, but "women's involvement in brokering peace often serves to [further] crystallize women's movements, thereby emboldening women's rights and enabling their public leadership in a range of arenas."²²²

3. The Challenge of John Hart Ely

²¹⁹ See *supra* notes 199-205 and accompanying text (discussing Julie Suk's work on gender quotas in France).

²²⁰ For a discussion of how the Supreme Court's recent jurisprudence reflects a concern with "antibalkanization," see Siegel, *From Colorblindness to Antibalkanization*, *supra* note 14, at 1278 (discussing "how Justice Kennedy reasons from antibalkanization values in the recent cases of *Parents Involved in Community Schools v. Seattle School District No. 1* and *Ricci v. DeStefano*").

²²¹ Suk, *Quotas and Consequences*, *supra* note 16, at 228-49 (describing the use of gender quotas in Europe as enhancing social cohesion and having an antibalkanizing effect).

²²² Verveer, *supra* note 154.

This leads to a third potential critique, which is that while the idea of democratic legitimacy draws inspiration from John Hart Ely's political process point,²²³ Ely himself favors protection in the political process only for racial minorities, not necessarily for women. His book, *Democracy and Distrust*, is a defense of *Brown v. Board of Education* and protection of racial inequality as a suspect classification due to underrepresentation in the political process.²²⁴ But in *The Wages of Crying Wolf: A Comment on Roe v. Wade*, Ely is skeptical that the same analysis can apply with equal force to women, at least as far as abortion rights are concerned.²²⁵ While acknowledging that there are few women in most legislatures, he notes as well that "no fetuses sit in our legislatures."²²⁶ Setting aside the abortion context, women are largely underrepresented in political and peace processes.²²⁷ This underrepresentation is in large part based on the fact that "[i]n the modern European nation-states, men have been expected to participate as citizens of the state, and market-maximizers in civil society . . . [while] social reproduction tasks get allocated to women, despite the formal redefinition of women as citizens and market participants."²²⁸ The notion of democratic legitimacy paves the way for increasing women's representation as "a strategy for disrupting the assumption that democratic citizens are 'men.'"²²⁹

IV. Inclusive Security: Moving Beyond Gender Essentialism

A final benefit of the democratic legitimization approach is that it holds the greatest potential for moving beyond existing flawed accounts and reframing WPS as "inclusive security."²³⁰ Ambassador Swanee Hunt, for instance, has sought to reframe WPS around the idea

²²³ ELY, *supra* note 207, at 103; *see also supra* note 207 and accompanying text.

²²⁴ *See* ELY, *supra* note 207, at 150-51.

²²⁵ John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 933-35 (1973).

²²⁶ *Id.* at 933.

²²⁷ *See* NO CEILINGS, *supra* note 3 (discussing the underrepresentation of women in a variety of fields); *see also* Richard A. Posner, *Democracy and Distrust Revisited*, 77 VA. L. REV. 641, 646 (1991) (responding to Ely's skepticism about women as a suspect class in the context of reproductive rights); Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 951-52 (2002) (explaining the significance of the shift from women being represented through male heads of household to directly representing their own interests at the ballot box); *supra* Section I.A (discussing the underrepresentation of women in peace negotiations).

²²⁸ Suk, *supra* note 182, at 10-11. Of course, "the *traditional* solution to the problem of social reproduction [was] to assign the tasks to a category of persons – women – who are *excluded* from political and economic citizenship." *Id.* at 10 (emphasis added). Suk notes that Carole Pateman termed this dynamic the "sexual contract." *Id.* (citing CAROLE PATEMAN, *THE SEXUAL CONTRACT* (1988); CAROLE PATEMAN, *THE DISORDER OF WOMEN: DEMOCRACY, FEMINISM, AND POLITICAL THEORY* 33 (1989)).

²²⁹ Suk, *supra* note 182, at 11.

²³⁰ Hunt & Posa, *supra* note 19, at 38.

that “inclusive security”—security that includes women’s participation—leads to more sustainable peace and security. While reconceiving WPS as inclusive security is a brilliant undertaking, changing the terminology alone is only the first step. Shifting the normative understanding of why inclusive security deserves support is the next step and will benefit from the democratic legitimacy framework.

Placing the idea of inclusion within the security paradigm is critical because, as Ambassador Hunt notes, “in much of the policy world, when you talk about women, one eye glazes over. And when you talk about peace, the other eye glazes over.”²³¹ Framing the issue as “inclusive security” places women at the center of security matters and emphasizes the value that women bring to the table, while keeping policymakers engaged and side-stepping the most essentialist aspects of WPS norms.

Still, Hunt relies largely on the antisubordination and securitization accounts. From an antisubordination perspective, she argues for opening up opportunities for women; from a securitization perspective, she contends that the unique perspectives women bring to the table lead to more sustainable peace because women “perform” differently from men. For example, Hunt argues that women negotiators often have a more collaborative style, making it easier for them to work through differences.²³² “[O]n the ground, women may be more in touch with their community, knowing which teenagers are disaffected or most likely to fall in with radical groups.”²³³ Moreover, in many parts of the world, “women’s status as second class citizens allows them to go places without being noticed.”²³⁴ However, we do not know whether women will continue to “perform” in these ways as they move into positions of power.

As demonstrated by the empirical research discussed in Part I, because civilian women often experience war differently than combatant men, at least *in the short term* (while this gendered divide still exists), gender-balanced processes can lead to more durable peace, so long as other conditions are present. However, because gender is socially constructed and identity is “tenuously constituted in time,”²³⁵ *over the longer run*, the essentialist view in the securitization account that women perform in ways that lead to more sustainable peace may not be sustainable if, as gender roles change, women begin to perform in different ways.

Borrowing from the idea of transitional justice—which addresses justice concerns in societies transitioning from systems of grave injustice (such as authoritarianism or apartheid) to more democratic arrangements—I view WPS as an element of a broader gender equality

²³¹ Ambassador Swanee Hunt, *supra* note 20.

²³² Catherine Powell, *Reframing the Conversation: Inclusive Security*, COUNCIL ON FOREIGN RELATIONS (June 1, 2015) <http://blogs.cfr.org/women-around-the-world/2015/06/01/reframing-the-conversation-inclusive-security/> (summarizing Ambassador Hunt’s views).

²³³ *Id.* (paraphrasing Ambassador Hunt).

²³⁴ *Id.* (paraphrasing Ambassador Hunt).

²³⁵ BUTLER, *GENDER TROUBLE*, *supra* note 8, at 140.

transition that is shifting societies around the world from systems in which women are largely excluded to structures that are more inclusive and reflect more equal distributions of power (at least along the axis of gender). As Antonio Gramsci noted, “The crisis consists precisely in the fact that the old is dying and the new cannot be born; in this interregnum a great variety of morbid symptoms appear.”²³⁶ Most women still carry the burden of inequality and continue to be excluded from combat and other peace and security positions that result in a gendered experience of war. While gender roles are changing and women are securing greater equality and inclusion, this process is rapid in some countries at times and is gradual and slow in others. WPS is a vehicle to assist in the gender equality transition.

A democratic legitimacy account of inclusive security can reframe the WPS debate, because legitimacy turns on enhancing the *representativeness* of the process as a whole, rather than opening up opportunities for women per se or expecting that women will “perform” in a particular way. As this Article’s discussion of gender quotas in France indicates, when women’s representation is conceived of as turning on democratic legitimacy, rather than antistatist concerns, the primary aim becomes legitimizing the exercise of power rather than enhancing the opportunities of individuals or a group. A legitimacy framework creates a new theoretical model in which gender balance is a *collective* democratic aim, rather than an equal opportunity right for a specific group. In reconceiving inclusive security, the legitimacy framework underscores the fact that governance cannot be universal, democratic, accountable, or legitimate if half of humanity is not represented.

A democratic legitimacy account of “inclusive security” also moves the WPS field away from an approach that essentializes women or that turns on a rigid construction of what women are ultimately capable of representing—both in the democratic theory sense of representation and in the gender performance sense. In fact, Ambassador Hunt acknowledges that women should be free to choose militarism over peace, even while she believes women are less likely to do so than men.²³⁷

While law has traditionally seen gender as an unbending category,²³⁸ this paradigm may shift as women increasingly move into traditionally male sectors of the economy and as more people recognize that gender identity may be relatively fluid. Today, though, many women who rise to positions of power still wonder whether they have to become the functional equivalent of men²³⁹—that is, “persons who spend little or no time on the tasks of social reproduction,”

²³⁶ ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI 276 (Quintin Hoare & Geoffrey Lloyd. Nowell-Smith eds. & trans., 1987).

²³⁷ Hunt, *supra* note 20.

²³⁸ See generally JOAN WILLIAMS, UNBENDING GENDER (1999).

²³⁹ Cf. LANI GUINIER, MICHELLE FINE & JANE BALIN, BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE 29 (1997) (“For these women, learning to think like a lawyer means learning to think and act like a man. As one male professor told a first-year class, ‘To be a good lawyer, behave like a gentleman.’ Hence our title.”).

because they are “either childless or capable of avoiding their social reproduction functions (by delegating to spouses, family members, nannies, daycares, or schools).”²⁴⁰

A further challenge (and opportunity) is that, now that the Obama Administration has dropped the combat ban on women, we must think in more complex ways about masculinity and WPS. Women will be permitted to fight in combat position in the U.S. military on an equal basis, as women already do in the Israeli and other militaries.

Ultimately, the success of inclusive security may turn on whether countries are willing to develop more inclusive processes more generally, as through the development of National Action Plans. Rather than being developed by the UN and filtered from there to national governments in a top-down fashion, NAPs are frequently demanded by NGOs and developed by national governments in close coordination with NGOs. For example, NGOs in the United States demanded that the Obama Administration adopt a NAP, and the Administration eventually developed one through an interagency group coordinated by the White House National Security Council staff, with extensive input from representatives of civil society in the United States (many with experience overseas in conflict zones) and congressional staff.²⁴¹ Additionally, “U.S. representatives in the field engaged in consultations with women and women’s organizations, gender equality advocates, and government interlocutors to ensure that their perspectives and interests informed the Plan.”²⁴² More inclusive, bottom-up processes follow the feminist methodology of participatory decision-making.²⁴³ Participatory decision-making could more effectively disrupt the structures of dominance and subordination that have long excluded women from matters of war and peace. Drawing on the theory of international lawmaking from the bottom,²⁴⁴ such strategies could also pave the way toward solutions that are more responsive to affected individuals and communities, who will have a greater stake and deeper investment in sustaining solutions they are involved in developing. Thus, these approaches can be more

²⁴⁰ Suk, *supra* note 182, at 11.

²⁴¹ See NATIONAL ACTION PLAN, *supra* note 151, at 11.

²⁴² *Id.*

²⁴³ Dianne Otto, *Power and Danger: Feminist Engagement with International Law Through the UN Security Council*, 32 AUSTL. FEMINIST L.J. 97, 105 (2010) (discussing the “bottom-up” process of developing NAPs by local feminist NGOs to forge transnational networks in asserting their “direct participation in the traditionally ‘male’ spaces of decision-making associated with conflict resolution and peace building [by] rely[ing] on an understanding of power that is ‘bottom-up’”). Such bottom-up strategies are actively being practiced in other peace and security contexts (outside of NAPs) by groups such as Women Without Walls (in Nigeria) and Sisters Against Violent Extremism (in India, Pakistan, and Tajikistan). See Melody Hood, *More than 35,000 People Rally Behind Nigerian Women To Bring Back Our Girls*, INCLUSIVE SEC. (July 8, 2015), <https://www.inclusivesecurity.org/more-than-35000-people-rally-behind-nigerian-women-to-bring-back-our-girls/>; SAVE-Sisters Against Violent Extremism, WOMEN WITHOUT BORDERS, <http://www.women-without-borders.org/save/>.

²⁴⁴ See, e.g., Janet Koven Levit, *Bottom-Up Lawmaking: The Private Origins of Transnational Law*, 15 IND. J. GLOBAL LEGAL STUD. 49 (2008); Janet Koven Levit, *Bottom-Up Transnational Lawmaking: Reflections on the New Haven School of International Law*, 32 YALE J. INT’L L. 393 (2007).

effective as a practical matter as well as more respectful of the integrity of individuals whose lives are affected by peace and security measures.

CONCLUSION

This Article offers a new framework based on the theory of democratic legitimacy as an alternative justification for increasing women's participation in developing peace agreements. This novel approach can more effectively reframe WPS matters as "inclusive security" and move the field beyond the prevailing antisubordination and securitization approaches. By proposing and theorizing democratic legitimation as an alternative account of WPS, this Article identifies a descriptively and normatively more appealing way to maneuver around formal equality on the one hand, and instrumentalist claims that women will "save" the world on the other. After all, not all women are "peace-loving," particularly in a world where women who succeed are often those who can succeed on terms defined by men. Further, traditional expectations of gender performance reify the category of "woman" so that the category restricts as much as it liberates.

In sum, the field of WPS should not be merely a tool for placing women's faces at the peace and security table. It should be a vehicle for feminist and democratic values to co-opt global governance. Promoting women's leadership and representation is good as a matter of equality, as a matter of "waging" peace, and as a way of enhancing the legitimacy and democratic accountability of peacemaking. But simply increasing the numbers of women in these fora may not in itself secure feminist goals or more sustainable peace over the long run, as women leaders themselves become elites and move away from community concerns. Because "the master's tools will never dismantle the master's house,"²⁴⁵ the turn toward more participatory mechanisms—such as National Action Plans—in contrast to the typical top-down approach of most UN and national policy-making may be key to WPS's ultimate success, at least on feminist terms.

In the end, if peace and security policymaking grows more inclusive in various ways—including with the participation of women and other members of the community who may be underrepresented²⁴⁶—it will not only lead to better outcomes, but, as John Hart Ely's political process theory suggests,²⁴⁷ will also be perceived as more legitimate and will secure greater buy-in from those the policies are intended to serve. So long as being a woman is a proxy for bringing different experiences and perspectives to the peace table—thanks to gendered social roles and the fact that (civilian) women often experience war differently from (combatant) men—women's participation in peacemaking will help legitimize peace processes. In democratizing peace processes and the governing structures that flow from them, women can still "save" the world,

²⁴⁵ Audre Lorde, *The Master's Tools Will Never Dismantle the Master's House*, in *SISTER OUTSIDER: ESSAYS AND SPEECHES* 110 (1984); see also Otto, *supra* note 243 at 98 (quoting Audre Lorde and criticizing the UN's top-down approach).

²⁴⁶ Other members of the community who may also be underrepresented, but who could bring important perspectives to peace processes, could potentially include teachers, health care providers, members of minority groups, and community leaders.

²⁴⁷ ELY, *supra* note 207.

but through a different mode than the predominant instrumentalist securitization discourse would have us believe.